88-934

No.

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

IRENE O'CONNELL KRUSE,
Petitioner,

VS.

BANK OF AMERICA, N.T. & S.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

1. Whether participation in an appellate review by a justice who has failed to disclose that counsel for respondent had a history of acting as attorney for the justice's family corporation, and whose family heritage and personal life are so deeply associated with respondent and its law firm that he is biased in favor of the respondent, violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the bias and conflict of interest of a single justice on a panel of three violates due process and should cause the decision to be vacated.

3. Whether a deliberate and intentional refusal by an appellate court to apply standard rules of appellate review, thereby usurping the jury function to itself, and reviewing and reversing the trial court judgment on legal theories and facts different from those on which the judgment was based, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

4. Whether a state's failure to allow an adequate remedy for challenge and disqualification of a biased justice violates the Due Process Clause of the Fourteenth Amendment and the Supremacy Clause, Clause 2 of Article VI.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION ONE

The petitioner, Irene O'Connell Kruse, respectfully prays that a writ of certiorari issue to review the order and modified opinion of the Court of Appeal of the State of California, First Appellate District, Division One, filed June 17, 1988, on which review was denied by the California Supreme Court on September 1, 1988. The opinion of the Court of Appeal reversed an award in favor of petitioner against respondent, the Bank of America, N.T. & S.A. ("Bank of America" or "Bank").

OPINIONS AND ORDERS BELOW

The modified opinion of Division One of the First Appellate District of the California Court of Appeal reversing the judgment of the trial court is reproduced in Appendix A, and is reported at 202 Cal.App.3d 38 (Cal. Ct. App. 1988). The order of that court denying petitioner Kruse's petition for rehearing and for disqualification of the individual justices is unreported and is reproduced in Appendix B. The order of the Supreme Court of the State of

California denying review is unreported and is reproduced in Appendix C. An order of the Court of Appeal denying permission to file briefs is also unreported and is reproduced in Appendix D.

JURISDICTION

The judgment of the Court of Appeal was originally entered on May 18, 1988, and modified on June 17, 1988. A timely petition for review was denied by the California Supreme Court on September 1, 1988. This petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment (U.S. CONST., amend. XIV, § 1) provides:

> [N]or shall any State deprive any person of . . . property, without due process of law. . . .

2. The Supremacy Clause (U.S. CONST., art. VI, cl. 2) provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The Equal Protection Clause of the Fourteenth Amendment (U.S. CONST., amend. XIV, § 1) provides:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

Petitioner has learned that the Bank's outside litigation counsel in this case, Mr. David B. Flinn, and his law firm, Leland, Parachini, Steinberg, Flinn, Matzger & Melnick, have long acted

as the attorneys on behalf of the family corporation of Justice William A. Newsom, who participated on the panel of three justices who reversed petitioner's judgment.

In a public disclosure statement filed in 1982, Justice Newsom stated that he owned an interest in Squaw Valley Improvement Corporation worth between $10,000 and $100,000, which he identified as his family corporation. App. E, 48, F. On November 18, 1988, petitioner was astounded to learn that Mr. Flinn, himself, has represented Justice Newsom's family corporation, serving *as the corporation's assistant secretary*. App. G, 65. A Statement by Domestic Stock Corporation filed with the California Secretary of State's Office on behalf of Squaw Valley Improvement Corporation in June of 1982 identifies Mr. Flinn as its assistant secretary *and the agent for service of process*. App. G, 64. The address of record for Justice Newsom's company is his office at the Court of Appeal, and the company's principal executive office is listed as Mr. Flinn's law firm. App. G, 62.

In 1982-83, Justices Newsom and John T. Racanelli were assigned the appeal of a similar case against the Bank of America, *Sanchez-Corea v. Bank of America*, 150 Cal.App.3d 202, in which it had defrauded another customer of the Bank. Mr. Flinn also appeared on behalf of the Bank in that case. Justices Newsom and Racanelli voted to reverse that award, but it was reinstated by the California Supreme Court, in 38 Cal.3d 892 (1985), and a judgment for $1.0 million compensatory damages and $1.0 million punitive damages was preserved. Justices Racanelli and Newsom did not disclose any financial relationships with the Bank of America in the *Sanchez-Corea* case, nor did Justice Newsom reveal that Mr. Flinn was attorney for his family company. App. H, 66-68. Justice Newsom failed to disclose his interest in the family corporation in his 1982 or 1983 public disclosure statements, while the *Sanchez-Corea* case was pending before him. App. F, 49-58. Nor has Mr. Flinn offered to disclose, at any time, his association with Justice Newsom.

Mr. Flinn acted as counsel of record for the Bank of America in the *Sanchez-Corea* case, even though he was clearly an officer *and* the registered agent for service of process for Justice Newsom's family corporation at that time. App. I, 69. Under Califor-

nia law, Mr. Flinn continues to serve as the agent for service of process for the corporation and its shareholders, including Justice Newsom, even though the corporation was dissolved in 1983.[1]

B. Statement Of Facts

After a three-month jury trial in Sonoma County Superior Court, California, Mrs. Irene O'Connell Kruse recovered judgment in July, 1985, against the respondent Bank of America on her claims of fraud, intentional interference with prospective economic advantage, and intentional infliction of emotional distress. It was proven that the Bank intentionally and fraudulently bankrupt her family business corporation, the James E. O'Connell Company ("O'Connell Company"), and that it eliminated the O'Connell Company as competition for its major competitor, the Sebastopol Cooperative Cannery ("Sebastopol Co-Op"), while trying to salvage a $20.0 million loan which the Sebastopol Co-Op owed the Bank.

In late 1978, the Bank of America encouraged the building of and began providing construction funds for a new apple dehydration facility for the O'Connell Company.[2] The Bank had orally promised that it would provide a long-term or "takeout" loan for the project when the plant was finished. During the construction, the Bank made an additional request of Mrs. Kruse to pledge a controlling interest in the O'Connell Company to an intermediary, the George Jewell family, as a condition to the continued provision of funds for the project.[3] At the time of the request,

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[1] CAL. CORP. CODE § 2011(b) provides: "Summons or other process against such a corporation may be served by delivering a copy thereof to an officer, director or person having charge of its assets or, if no such person can be found, to any agent upon whom process might be served at the time of dissolution. . . ." Section 2011(c) provides that: "Every such corporation shall survive and continue to exist indefinitely for the purpose of being sued in any quiet title action. . . ."

[2] The cost of the facility was approximately $2.0 million.

[3] Because of a close relationship between the Jewells and the local branch manager of the Bank, the construction funds for the plant were loaned directly to Jewell, who with the knowledge and approval of the

Mrs. Kruse owned all of the stock of the company, which specialized in the production of dehydrated apple and vegetable products distributed nationwide.

Pursuant to the Bank's request, Mrs. Kruse pledged a controlling interest in her company to the Jewells for the nominal sum of $180 with an express agreement that the Jewells would return the stock for the same price when the long-term loan from the Bank of America was funded.[4] At the time of the pledge, Mrs. Kruse's controlling stock interest was worth approximately $490,000. App. A, 27.[5] During the construction, the Bank's branch manager received periodic progress reports and suggested various design changes for the plant in order to qualify it for the long-term loan. In reliance on the Bank's promise of a takeout loan, no other banks were approached. The construction was completed in mid-1979, but the Bank refused to provide the takeout financing, leaving Mrs. Kruse suddenly unable to redeem her stock ownership from the Jewells. This refusal jeopardized not only the plant, but also Mrs. Kruse's home and extensive apple orchards which were located on the company's property.

The failure to receive the long-term loan collapsed both the O'Connells and the Jewells financially. The Bank instructed George M. Jewell to liquidate the O'Connell Company, including

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Bank was, in turn, providing the construction funds to the O'Connell Company to build the new plant. The long-term loan from the Bank was supposed to be made directly to the O'Connell Company to repay the Jewells for the construction funds advanced.

[4] At the trial, the Bank denied that it had requested the stock transfer. However, all of the percipient witnesses, except the Bank witnesses, testified that the Bank had initiated the concept of the transfer and had imposed it against the wishes of both the O'Connells and the Jewells as a condition to continuation of the financing.

[5] The Bank's counsel, Mr. Flinn, recognized during the trial that the transaction was a pledge, saying: "The last element that I think is relevant to discuss with the court is damages. We haven't talked a lot about it during the sessions we've had on any legal matters on this during the evidence, but under the facts of this case it's very clear that Mrs. Kruse gave Mr. Jewell a pledge—or a mortgage of those shares. She did not sell them to him." Record at 4810:4-9.

Mrs. Kruse's home and orchards. In November of 1980, Mrs. Kruse filed an action in the Superior Court for the County of Sonoma, State of California, against the Bank of America and the Jewells. The litigation sought to enjoin the liquidation of the O'Connell properties and to recover damages on the basis that the Bank had misrepresented it would provide long-term financing and that she had transferred her stock ownership in justifiable reliance upon the Bank's representations.[6] No breach of contract cause of action was claimed by Mrs. Kruse; rather, she based her claims solely upon tort theories.

In July of 1985, a Sonoma County jury rendered a verdict in favor of Mrs. Kruse against the Bank of America in the amount of $9.445 million, which included $2.67 million in compensatory damages, $100,000 for emotional distress and $6.675 million for punitive damages. The case drew national attention, not only because of the magnitude of the award, but because it symbolized the concept that even an individual can succeed in our judicial system against an enormous economic force like the Bank of America.

Mrs. Kruse contended at trial that the Bank had never intended to give the long-term loan because of its desire to protect its $20.0 million loan to the Sebastopol Co-Op, which was on the brink of financial collapse as a result of the competitive activities of the O'Connell Company and Jewell.[7] The Bank argued at trial that it had never contractually committed to give a long-term loan and denied that the financing was refused for competitive reasons. The jury, however, found in favor of Mrs. Kruse.

The Bank moved for a new trial, which the trial judge denied on the condition that the punitive award be reduced to $1.0

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[6] The case against the Jewells was settled before trial.

[7] Also, at trial, plaintiff sought to introduce evidence from a witness who had overheard the Bank's counsel, Mr. Flinn, instruct the Bank's branch manager at a local coffee shop before his deposition to give perjured testimony by saying that he did not know about the stock pledge by Mrs. Kruse. The trial judge excluded the evidence on the ground that it would require Mr. Flinn to testify, thereby causing his recusal and a mistrial.

million. Mrs. Kruse agreed to the remittitur and judgment was entered in the total amount of $3.77 million. The Bank appealed from the reduced judgment.

The appeal was assigned to Division One of the First Appellate District of the State of California,[8] consisting of Justices Racanelli, Newsom and Norman Elkington.[9] In May of 1988, the panel rendered its decision reversing the trial court judgment on the ground that there was no substantial evidence to sustain it.[10] All three justices concurred in the opinion. In so doing, the panel recast the evidence in the light most favorable to the Bank, drew all inferences from the evidence in favor of the Bank, and ignored voluminous evidence introduced in support of the judgment.

The Court of Appeal denied a recovery to petitioner on her fraud count on the ground that there had not been a firm contract to provide the long-term financing, even though Mrs. Kruse was not seeking a recovery based on contract. App. A, 28. The court stated "The [fraud] argument falls under its own weight, the record reflecting an absence of any substantial evidence supporting *an enforceable promise* or *commitment* to lend money," App. A, 28 [emphasis added].

The court ruled as a matter of law that the Bank could not have anticipated that she would transfer her stock at such a low price,

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[8] The First Appellate District sits in San Francisco and has five divisions, with four justices assigned to each division. Three of the justices are assigned to each case. In 1984, the Bank hired former Justice Winslow Christian of the First Appellate District to act as its Director of Litigation, and subsequently placed him in charge of the *Kruse* appeal.

[9] A fourth member of the panel, the Honorable John W. Holmdahl, routinely disqualifies himself in Bank of America appeals because of work he did for the benefit of the Bank as a former state senator.

[10] The panel refused to allow the plaintiff to file a portion of her respondent's brief which raised the issue of Mr. Flinn's alleged subornation of perjury which was submitted under seal on the ground that there was no procedure for accepting briefs in such form. Upon formal motion, the court refused to allow the filing of any materials by plaintiff on this issue. App. D, 38-46.

even though it recognized that the Bank had induced her to transfer it as a pledge.[11] App. A, 27-28. The panel also held that there could be no recovery for interference with prospective economic advantage by Mrs. Kruse on the ground that a shareholder cannot seek a recovery for interference between a *shareholder* and her *corporation*, App. A, 31-32, even though Mrs. Kruse had pleaded and claimed that the interference was with the relationship between *her* and the *Jewells*, as pledgees of the stock, and not between her and the corporation. App. J, 81-83. The opinion was replete with rhetorical arguments on behalf of the Bank, and on its face did not even purport to be a fair and impartial review.[12]

Subsequent to the Court of Appeal's opinion, petitioner also learned that Justice Newsom was the grandson of William A. Newsom I, one of the early owners of the Bank of America. His percentage of stock ownership during the Bank's formative years was second only to its founder, A. P. Giannini. App. K, 87. William A. Newsom I was the Bank's first branch manager,[13] and at his death was the Chairman of the Bank's Advisory Committee. App. L, 88-89. Petitioner learned that during the conferencing sessions on the appeal, Justice Newsom had obtained a "CustomLine Preferred" line of credit from the Bank of America and had drawn over $10,000 on it.[14] App. F, 60. The "preferred"

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[11] On appeal, the Bank no longer denied the fact that it had been the motivating force for the stock pledge, but argued instead that it could not have foreseen that the transfer would be made at such an unreasonably low price and that, as a result, it could not have been the cause of the damage to Mrs. Kruse. This, of course, ignores the fact that a transfer at a nominal price for security purposes *is* a pledge.

[12] *See, e.g.*, the characterization of plaintiff's contentions as "sheer nonsense," App. A, 30, and the comment that "Perhaps all that can be said is that the axis of the financial world turns more on economic reality than human compassion." App. A, 34.

[13] The Bank of America is renowned as the originator of the branch banking system in the United States. App. K, 85-87.

[14] Justice Newsom also serves as an officer of a small, recently-formed medical foundation known as the International Bioethics Institute,

line of credit is unsecured and is designed to accommodate loans up to $50,000. App. N, 91-93.

Plaintiff moved to disqualify Justices Racanelli and Newsom on the grounds that Justice Racanelli had a financial interest in the Bank of America and that Justice Newsom was indebted to the Bank. Both justices had announced their conflict of interest in another case to which the Bank was a party, *In the Matter of the Estate of Gilda Barberis.*[15] Nonetheless, neither Justices Racanelli nor Newsom offered to disqualify themselves before deciding the Bank's appeal in this case. The same justices had failed to disqualify themselves in yet a third case, *Sanchez-Corea v. Bank of America, supra.*

Petitioner moved for a rehearing and requested that the matter be transferred to another panel. App. O, 96. But the panel denied the petition for rehearing, refused to disqualify itself and did not refer the question of its disqualification to an independent panel. App. B, 36. It instead made over 100 modifications to the opinion. App. A. Recognizing it was in error, the court changed the basis on which it had denied a fraud recovery by deleting reference to the absence of "an enforceable commitment" and substituting a new factual ground, never asserted by the Bank in the appeal, namely that there was no justifiable reliance by Mrs. Kruse. App. A, 28. The jury and trial court, of course, had found squarely the opposite.

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which has only four officers. Justice Newsom is Vice President and the Treasurer is Leland S. Prussia, who was Chairman of the Board of the Bank of America at the time of trial and while the appeal was pending. App. M, 90.

[15] In *In the Matter of the Estate of Gilda Barberis*, No. A026709, slip op. at 3 (Cal. Ct. App. 1986), the Bank of America was acting as a testamentary Trustee. The trial court, over the objection of the Bank, had dissolved a trust in favor of the beneficiary and the issue was whether the Bank should reimburse the beneficiary for attorneys' fees. On appeal, the same panel as in this case ruled in favor of the Bank. At the oral argument, Justice Racanelli volunteered that he had a financial interest in the Bank of America. App. P. Although Justice Newsom revealed the existence of "a loan," he did not reveal the pervasive extent of his relationships with the Bank.

Mrs. Kruse next petitioned the Supreme Court of the State of California for review, pleading all grounds for disqualification known at that time, including violations of due process and equal protection under the Fourteenth Amendment and that the Supremacy Clause requires a state court to conduct a review of federal constitutional issues. Petitioner filed declarations of three independent attorneys who had heard Justices Racanelli and Newsom offer to disqualify themselves in the *Barberis* case. App. P, 104-110. On September 1, 1988, the Supreme Court of California denied the petition for review without opinion. It also denied the application to take evidence, stating that Mrs. Kruse had "not made a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law." App. C, 37. In November of 1988, petitioner learned of Justice Newsom's long association with the Bank's outside counsel in this case.

This petition follows.

C. Presentation Of The Federal Questions To The California Courts

Petitioner had no opportunity to raise the federal questions to the Court of Appeal itself because the request for disqualification was neither responded to nor ruled upon until June 17, 1988. On that date, the California Court of Appeal simultaneously filed its order denying the request to disqualify, its order denying rehearing, and its modified opinion. Upon denying rehearing, the Court of Appeal exhausted its jurisdiction, and there were no procedural means of raising the federal questions in the Court of Appeal after that date. Only then did the federal constitutional claims and questions mature and become ripe for determination.

Therefore, the first reasonable opportunity which petitioner had for raising the federal constitutional questions was in her Petition for Review addressed to the California Supreme Court. In the Petition for Review, petitioner squarely presented her claims of violation of Fourteenth Amendment due process and equal protection rights and the Supremacy Clause. App. Q, 111-117. Counsel for petitioner did not stop with a mere pro-forma presentation of the claims. Petitioner pointed out to the court that this was not the usual case where the California Supreme Court could

rely upon California Rules of Court Rule 29(a) (see App. R, 146-147) to exercise discretion in granting or withholding review. That is because the Supremacy Clause, as interpreted by decisions of this Court (which were cited to the California Supreme Court), mandates that state courts exercise jurisdiction to enforce federal constitutional rights. Therefore, petitioner argued that the California Supreme Court should grant review of her claims of violation of those rights by the Court of Appeal.

Pursuant to Rule 23(b) of the California Rules of Court, App. R, 145-146, counsel for petitioner filed with the California Supreme Court a motion to take evidence and discovery concerning the justices' financial interests and personal bias in favor of the Bank. During the pendency of that motion and the petition for review, counsel for petitioner continued their ongoing investigation into the financial interest and bias of the justices. As additional information was obtained it was placed in supplemental pleadings and lodged with the clerk of the court, together with applications that those pleadings be filed and considered. App. Q, 118-144.

The California Supreme Court never did rule on the applications for filing supplemental briefs or pleadings. The supplemental pleadings and information, although lodged, were never filed and, presumably, were never considered by the court. Instead, the motion for an evidentiary hearing was denied by the California Supreme Court in an order filed simultaneously with the order denying review. App. C, 37. This may serve, in part, to explain the language used by the California Supreme Court in denying the motion, that petitioner had not made even a "prima facie showing of conflict of interest or bias, much less a deprivation of due process of law."

That statement was apparently made without considering the significant additional facts and evidence lodged with the court in supplemental pleadings. Further, it absolutely was made without consideration of the then unknown fact that Mr. Flinn, counsel for the Bank, was also Justice Newsom's corporate attorney. That fact was not discovered until November 18, 1988 by independent non-judicial means.

REASONS FOR GRANTING THE WRIT

A. The Importance And Substantiality Of The Questions Presented

The Due Process Clause of the Fourteenth Amendment does not require states to make any appeal procedure available; nevertheless, when an appeal procedure is provided, it is part of the "process" which must be "due" and the appellate review must be applied equally, and not arbitrarily. *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 43, 75 S.Ct. 92, 95-96 (1954); *Frank v. Mangum*, 237 U.S. 309, 327, 35 S.Ct. 582, 587 (1915). Fairness and impartiality of the appellate justices in the state judicial systems, and whether a justice is so biased or prejudiced as to be unable to be fair and impartial, are therefore matters of vital concern and fundamental importance to this Court and the entire nation in order to ensure the impartial dispensation of justice.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580 (1986), this Court voiced its concern over when bias or prejudice on the part of a justice on a judicial panel rises to the level of a denial of due process, but found it unnecessary to decide the issue, leaving it for future determination. The Court also raised, but found it unnecessary to decide, the issue of whether the presence of a single disqualified justice on a panel invalidates the decision, again leaving this issue for determination in an appropriate case.

More recently, on June 17, 1988, this Court issued its decision in *Liljeberg v. Health Services Acquisition Corp.*, 56 U.S.L.W. 4637 (U.S. June 17, 1988) (No. 86-957), 108 S.Ct. 2194. The Court dealt with construction and application of the federal statute governing disqualification of trial and appellate judges for bias or prejudice which would cause a disinterested observer knowing the facts reasonably to question the impartiality of the judge. This Court was thus *not* called upon specifically to determine the issue of when bias or prejudice rises to the level of a denial of due process. Nevertheless, the Court voiced its continuing grave concern over this issue by citing *Aetna, supra*, in a footnote, and stating that this concern over bias and prejudice of

judges and justices "has constitutional dimensions," thus foreshadowing decision of this issue in a future case, such as this one. 56 U.S.L.W. at 4642, 108 S.Ct. at 2205 n.12.

We submit there could be no more compelling and appropriate case than the present one for the resolution of these basic issues, that is: (1) when bias and conflict of interest can be said to violate due process, (2) whether the presence of a single disqualified justice on the panel invalidates the decision, and (3) resolution of the related issues raised in this petition.

1. This Court Should Decide Whether Due Process Is Violated When A Justice Is So Biased Or Prejudiced That It Reasonably Appears He Cannot Be Fair And Impartial

The Due Process Clause is a bulwark of protection against prejudicially unfair state action, including judicial action. Here, with the evidence presently available, at least one of the three justices on the panel that reversed petitioner Kruse's judgment, Justice Newsom, had such a close legal, business and personal relationship to the appellant Bank of America, including the fact that the Bank's trial and appellate counsel was his undisclosed corporate attorney, that the inescapable conclusion is that Justice Newsom was strongly biased in favor of the Bank.

The Court of Appeal violated the procedural due process rights of petitioner on the appeal by reviewing and reversing the judgment on different legal theories than those on which it was based, by viewing the evidence and inferences not in the light most favorable to the judgment, but rather most favorable to the Bank, and by substituting its judgment on the facts for the jury's. No disinterested observer, knowing all of these facts, could fail to entertain a reasonable doubt as to the inability of Justice Newsom, or the panel, to be fair and impartial.

The implication of the Court's opinion in *Aetna* and *Liljeberg* is that there is a need for an objective evidence test and workable rule of law that can be formulated and applied to determine when the purely subjective state of mind known as bias or prejudice can be equated with a violation of due process. We submit that the Court's task in formulating such an objective evidence test is a

simple one; the Court need only adopt the objective test announced in the American Bar Association Code of Judicial Conduct, Canon 3C(1)(a) (1980), which reads in pertinent part:

> Judges should disqualify themselves in a proceeding in which . . . their impartiality might reasonably be questioned, including but not limited to instances where:
>
> a. The judge has a personal bias or prejudice concerning a party. . . .

This objective standard was adopted by the American Bar Association only after a special committee, chaired by former California Chief Justice Roger Traynor, had sought and considered the views of the bench and bar and other interested persons throughout the nation. Thereafter, the California Judges Association adopted the code, and in 1974 Congress incorporated this objective test into 28 U.S.C.A. § 455 (West Supp. 1988) which was the basis of the Court's decision in *Liljeberg*, 56 U.S.L.W. 4637, 4640, 108 S.Ct. 2194, 2201 n.7.

Thus, the objective test stated in the ABA Canon and the federal statute, as noted in *Liljeberg*, is the presence of "facts that might reasonably cause an objective observer to question [the judge or justice's] impartiality." 56 U.S.L.W. at 4642, 108 S.Ct. at 2205. This Court has already indicated its approval of a substantially identical objective test in *Kugler v. Helfant*, 421 U.S. 117, 130-131, 95 S.Ct. 1524, 1534 (1975).

While the discussion in *Liljeberg* was in terms of the existence of a financial interest on the part of Judge Collins, it should be noted that he did *not* actually have a personal financial interest in the outcome of the case; rather, he was a trustee of a university which had a direct pecuniary interest in the outcome. Therefore, strictly speaking, *Liljeberg* involved a question of *bias* of Judge Collins in favor of the university which was to benefit from the disposition of the case. While the question of bias, without a direct pecuniary interest, was discussed in *Liljeberg*, there is no opinion yet issued by this Court which defines the degree of bias or prejudice required to reach the due process dimensions of the Fourteenth Amendment.

Justice Black, writing for the Court in *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955), stated:

> But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. *Circumstances and relationships must be considered.* [Emphasis added.]

The circumstances and relationships in our case, where Justice Newsom is so aligned with the Bank of America and opposing counsel as to be obviously partial and biased, rise to the level of a violation of due process. Further, it is respectfully submitted that it is absolutely necessary for the guidance of state courts to specify a workable formula for measuring the contours of the alleged judicial due process violation in each instance.

In *Liljeberg*, Justice Stevens found it "inexcusable" that the judge would not disclose his bias in favor of the university of which he was a trustee. 56 U.S.L.W. 4637, 4643, 108 S.Ct. 2194, 2207. In that case, the bias would, at worst, cause one of the two competing entrepreneurs in the lawsuit to lose in the race to make a business profit. By contrast in the present case, the bias in favor of the Bank of America resulted in a decision condoning the Bank's fraudulent and outrageous financial destruction of petitioner's entire net worth and life savings.

2. The Effect Of Disqualification Of A Single Justice Should Be Decided And Settled By This Court

This case squarely raises the issue of whether the participation by one biased justice on a panel of three invalidates the decision, even though the biased justice did not cast the deciding vote. In *Aetna*, concurring Justice Brennan took pains to point out his belief that the majority opinion should not be read to imply that having only a direct substantial pecuniary interest, or casting the deciding vote, would "taint the judge's participation as a due process violation." 475 U.S. 813, 829, 106 S.Ct. 1580, 1589. As Justice Brennan states, the participation of an interested or biased member "*necessarily* imports a bias into the deliberative process" which "deprives litigants of the assurance of impartiality that is

the fundamental requirement of due process." *Aetna, supra*, 475 U.S. at 831, 106 S.Ct. at 1590 [emphasis in original].

Concurring Justices Blackmun and Marshall were equally emphatic in stating their opinion that a due process violation does not turn upon casting the deciding vote because experience teaches that each member of the panel's involvement in the deliberative process plays a part in shaping the court's ultimate disposition. *Aetna, supra*, 475 U.S. at ____, 106 S.Ct. at 1591. As the Court has long recognized in *Berger v. United States*, 255 U.S. 22, 36, 41 S.Ct. 230, 234 (1921), "nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

Accordingly, we submit that Justice Newsom's participation in the deliberative process violated plaintiff's due process rights, even though the other two members of the panel voted for the reversal, and that this case presents the opportunity for this Court to so rule.

3. Due Process Is Most Certainly Violated When Bias Or Prejudice Manifests Itself In An Intentional Violation Of Procedural Rights

We submit that an alternative objective test would exist when bias or prejudice manifests itself in the form of an intentional violation of procedural rights of a party which is apparent in the decision-making process itself. There is no question that Justice Newsom knew of his family's financial heritage and of his own preferred loan with the Bank of America, and that counsel opposing petitioner was also his corporate attorney at the time that he participated in this case.

The rationale underlying the rule that a substantial financial interest in the outcome is disqualifying is that such interest presents "a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Aetna*, 475 U.S. 813, 825, 106 S.Ct. 1580, 1585, quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83 (1972). If this is so, certainly, objective evidence that the level of temptation from a proven bias or prejudice has risen so high that the justice has *actually acted unfairly* should establish the denial of due process.

Here, where Justice Newsom is shown to be biased *and* the panel prejudicially violates even one procedural right of a party, as in this case, by refusing to apply the required standards of appellate review, a violation of due process occurs. Here, the most graphic illustration of a violation of procedural rights on appeal is reviewing and reversing on legal theories and issues *different* from those on which the case was tried. This is such a serious violation of rights as to be in and of itself a violation of due process. As stated in *Cole v. Arkansas*, 333 U.S. 196, 202, 68 S.Ct. 514, 517 (1948):

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised [on appeal] on consideration of the case as it was tried and as the issues were determined in the trial court.

The rule is the same in civil cases. *Spevack v. Klein*, 385 U.S. 511, 518, 87 S.Ct. 625, 629 (1967).

In the present case, the Court of Appeal insisted that petitioner's fraud cause of action was a breach of contract cause of action, and reversed her judgment for fraud on the ground that the evidence was insufficient to prove breach of contract. By an equally unjust substitution of theories, the Court of Appeal reversed petitioner's judgment on each of her three causes of action. A violation of due process is inherent here because the bias has been manifested in the decision itself, directly to the prejudice of the petitioner.

This Court has not previously considered and ruled upon the issues of whether it is a denial of equal protection to intentionally refuse to view the evidence and inferences in the light most favorable to the judgment. But since the panel in question has on a previous occasion failed to apply the appellate standards of review in another Bank of America case, *Sanchez-Corea, supra*, and has failed to disqualify itself as required by law, there is a pattern of denial of equality in the application of appellate standards in the Bank of America cases referred to this panel. *See, e.g., Personnel Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256, 272-73, 99 S.Ct. 2282, 2292-93 (1979). Petitioner respectfully submits that the Court should review this case to make a full and

complete exposition of the law on constitutional requirements for a fair and impartial appellate review.

4. This Court Should Decide Whether Due Process Is Violated By The State's Failure To Provide An Adequate Remedy For Challenge And Disqualification Of A Biased Or Prejudiced Justice

A challenged justice or panel should not pass upon its own disqualification grounds or else a flagrant violation will occur of the rule that "no man can be a judge in his own case." *In re Murchison*, 349 U.S. at 136, 75 S.Ct. at 625. Justice Stevens recognized the inherent unfairness of a judge passing on his own disqualifications in *Liljeberg* when he noted that a full disclosure by Judge Collins "would have made it possible for a different judge to decide whether the interests—and appearance—of justice would have been served by a retrial." 56 U.S.L.W. 4637, 4643, 108 S.Ct. 2194, 2205. Or, as Chief Justice Rehnquist noted in his dissent in that case, the new federal law was designed to eliminate the unfairness of a judge subjectively passing on his own disqualification grounds so that "no longer was disqualification to be decided on the basis of the opinion of the judge in question . . ." 56 U.S.L.W. 4637, 4644, 108 S.Ct. 2194, 2209. But a subjective standard of review remains where a judge or panel determines its own bias or prejudice, and if the panel is indeed prejudiced, why would its judgment of itself suddenly become neutral?

The problem is well-illustrated in *Kaufman v. Court of Appeal*, 31 Cal.3d 933, 184 Cal.Rptr. 302 (Cal. 1982). There, a California Court of Appeal justice was challenged for bias. The Chief Justice of the California Supreme Court assigned a retired justice of the Supreme Court to sit on the Court of Appeal and conduct a hearing, who found that the challenged Court of Appeal justice was biased and therefore was disqualified. Upon writ of petition by the disqualified justice to the California Supreme Court, that Court annulled the findings and order of disqualification, and the litigants were forced to proceed with appellate proceedings participated in by a justice who had been found to be unable to be fair and impartial.

The California Supreme Court openly admits that it was reaching that patently unfair conclusion because of the lack of any statutory or case law guidance as to whether due process requires that the challenge be heard by another justice or justices. *Kaufman, supra*, 31 Cal.3d at 940 n.5. That is the very guidance which we submit this Court should give and make binding under the Supremacy Clause.

Even if another justice or panel of justices passes upon a challenge, due process is still denied if the challenged justice is not required to make full and complete disclosure of all facts bearing upon the alleged interests, bias or prejudice, and the challenging party is denied the opportunity to have discovery and an evidentiary hearing. Due process continues to be denied if the appellate court has jurisdiction to review the issue, but refuses to allow any form of discovery or evidentiary hearing when faced with a justice who remains silent, as Justice Newsom has in this case.

This Court has imposed upon petitioners in cases such as this a duty to raise federal constitutional claims in the state-court proceedings before this Court can act. *Bankers Life and Cas. Co. v. Crenshaw*, 56 U.S.L.W. 4418, 4420 (U.S. May 16, 1988) (No. 85-1765); *Webb v. Webb*, 451 U.S. 500, 101 S.Ct. 1889, 1893 (1981). Concomitant to the petitioner's duty to comply with the "not pressed or passed upon below" rule should be a duty on the part of the state court to review the federal constitutional question when it is "pressed." We submit that the state appellate courts have a duty to conduct a *meaningful* review of the constitutional issues presented by petitioner "in the first instance" and that this duty has long been recognized in decisions of this Court. *Hathorn v. Lovorn*, 457 U.S. 255, 269, 102 S.Ct. 2421, 2430 (1982); *Second Employers' Liability Cases*, 223 U.S. 1, 58, 32 S.Ct. 169, 178 (1912); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 339 (1816); *see also, Miller v. Municipal Court*, 22 Cal.2d 818, 851 (Cal. 1943); *Liljeberg, supra*, 56 U.S.L.W. 4637, 4645, 108 S.Ct. 2194, 2210 (O'Connor, J., dissenting—"I believe the issue should be addressed in the first instance by the courts below").

This Court has held that when a constitutional right exists, due process demands that a procedural opportunity be given to enforce that right, by presentation of evidence at a hearing. *Reece v. Georgia*, 350 U.S. 85, 89, 76 S.Ct. 167, 170 (1955); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S 673, 678, 50 S.Ct. 451, 453 (1930). The California courts have totally denied that opportunity to petitioner by refusing to allow any discovery or evidentiary hearing when faced with a judge who remains silent.

B. The Federal Question Was Properly Raised To Confer Jurisdiction Upon This Court

Where the federal question arises from a "surprise" decision of a state appellate court so that there is no earlier opportunity to present the question and have it decided in that Court, then the question may properly first be presented in a petition for rehearing. *Saunders v. Shaw*, 244 U.S. 317, 320, 37 S.Ct. 638, 640 (1917). It follows that where the federal questions arise out of the conduct of the Court of Appeal during the pendency of a petition for rehearing, and do not mature or become ripe for determination until denial of rehearing, as in this case, the federal questions necessarily can only be first raised in the next higher court with review jurisdiction. This was done here, by raising the federal questions in the Petition for Review by the California Supreme Court.

CONCLUSION

> Let reverence for the laws be breathed by every American mother, to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in Primmers [sic], spelling books, and in Almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in halls of justice. And, in short, let it become the *political religion* of the nation.

[Abraham Lincoln, from a speech to the Young Men's Lyceum of Springfield, January 27, 1838.]

There is more to be gained by making the legal system respected than is gained by making the banking industry protected. This case presents manifest violations of due process

wherein the means utilized were justified by the ends to be obtained. The judiciary and bar will both be served by a decision which formulates guidelines for the application of due process under circumstances where judges are biased or have a conflict of interest. This case presents the logical next step after *Aetna* and *Liljeberg* to formulate such guidelines for our judicial system and at the same time vacate a decision which has become a showcase of unfairness which, if left standing, can only discredit the judicial system. The petition should be granted and these questions be set for plenary consideration.

Respectfully submitted,

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Dated: November 30, 1988

APPENDIX

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APPENDIX A

Certified for Publication

In the Court of Appeal of the State of California

First Appellate District

Division One

AO 33064, AO 39161
(Sonoma County Super.
Ct. No. 112439)

Irene O'Connell Kruse,
Plaintiff and Appellant,

v.

Bank of America,
Defendant, Cross-Defendant and Appellant;

Charles Duck, as Trustee, etc., et al.,
Cross-Complainants and Appellants.

Order Modifying Opinion
and Denying Rehearing

[Filed June 17, 1988]

THE COURT:

It is ordered that the opinion filed herein on May 18, 1988, be modified in the following manner:

Deletions are indicated by strike-throughs, and insertions are underlined. Additions and deletions of footnotes throughout will require renumbering of footnotes.

The petitions for rehearing are denied.

Racanelli, P. J.

In the Court of Appeal of the State of California
First Appellate District
Division One

AO 33064, AO 39161
(Sonoma County Super.
Ct. No. 112439)

Irene O'Connell Kruse,
Plaintiff and Appellant,

v.

Bank of America,
Defendant, Cross-Defendant and Appellant;

Charles Duck, as Trustee, etc., et al.,
Cross-Complainants and Appellants.

INTRODUCTION

The underlying litigation arises out of a series of related loan transactions involving apple growers and processors and the Bank of America (Bank) under the evolving theories of lender liability. Following a three-month trial, the jury returned a verdict against the Bank and in favor of plaintiff and cross-complainants aggregating $20,020,000 in compensatory damages and $26,675,000 in punitive damages.

The trial court granted the Bank's motion for a new trial as to punitive damages only, conditioned on plaintiff's and cross-complainants' acceptance of a remittitur to $6 million in punitive damages; the remittitur was duly accepted. The Bank appeals, contending, inter alia, that no basis for liability for damages has been shown. Plaintiff and cross-complainants have cross-appealed seeking to reinstate the full award of nearly $47 million and to recover counsel's travel expenses.

FACTUAL BACKGROUND

Viewing the evidence, as we must, in a light most favorable to the judgment (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d

920, 925-926), we narrate the factual background in some detail in order to discuss adequately the several issues raised in this extensive litigation.

George M. Jewell,[1] like his father before him, has been a well established apple grower in the Sebastopol area for many years. By the early 1960's, George M. Jewell had developed an apple brokerage business, operated as a joint venture with his son, George R. Jewell. In addition to apples grown on their own ranch, the Jewells bought and collected apples grown by independent growers for sale to processing plants producing apple juice, dehydrated apples, applesauce, vinegar and other kindred products. At this time, about 80 percent of the apples harvested in the Sebastopol area were sold for processing purposes, and the remaining crop yield marketed as fresh fruit.

The two major apple processors in Sebastopol were the family-owned James O'Connell Company and the Sebastopol Cooperative Cannery ("Co-op"). The Co-op processed apples grown by its members but also purchased apples from non-members or "independents" whenever the supply of apples from its members was inadequate. The Jewells had supplied apples to the O'Connell Company, the principal Sebastopol outlet for independent growers, for a great many years.

1. *The Near Collapse of the O'Connell Company*

James O'Connell died in 1971, and his widow, Mrs. Irene (O'Connell) Kruse became the sole owner of the family corporation. Management of the business operations was entrusted to her 19-year-old son, Dan O'Connell.

The O'Connells had been long-standing customers of the local Bank, which had consistently funded their yearly operation. But in 1974, the Bank suddenly denied Dan O'Connell's request for a capital improvement loan for the O'Connell Company's processing plant. The following year, much to O'Connell's surprise, the

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[1] For ease of reference, the respective parties will be designated by their proper names unless otherwise indicated. Since the interests of the senior Jewells and the trustee-in-bankruptcy are identical, we will refer herein only to the former.

Bank refused to provide the customary annual line of credit to fund the company's business operations. William (Bill) Sullivan, the manager of the Bank's Sebastopol branch, extended some interim relief in the form of overdraft privileges approved as short-term loans secured by inventory and receivables; but without the annual loan funds, the O'Connell Company was soon unable to pay its creditors.

In April and May 1975, the Taylor-Doyle Company, one of O'Connell's major suppliers, obtained two judgments against the O'Connell Company for the sale of apples.[2] A sheriff's sale was scheduled in January 1976 to liquidate the O'Connell properties to satisfy the unpaid judgments.

Sometime during the summer of 1975, the Jewells learned of Dan O'Connel's business plight. Acting upon his son's suggestion, George M. Jewell agreed to assist O'Connell financially. In addition to his interest in keeping "a port open" for his suppliers, the independent growers, Jewell also wanted to aid his fellow farmer.[3]

The Jewells were themselves long-standing customers of the Bank. George M. Jewell spoke to Bill Sullivan and told him of his desire to assist O'Connell. Sullivan soon arranged to lend George M. Jewell $150,000, which he could, and did, in turn loan to the O'Connell Company to discharge the unpaid judgments and to settle other pressing debts. On Sullivan's advice, Jewell obtained a promissory note for the $150,000 loan secured by a second deed of trust on the O'Connell property. (The Bank held the first deed of trust securing an earlier outstanding loan.)

Later that same year (1976), Jewell borrowed an additional $114,000 from the Bank to lend to the O'Connell Company to finance an equipment purchase; that loan was secured by another

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[2] The Taylor-Doyle lawsuits were initiated after Sullivan revealed to a company director (also a bank officer) that the Bank had withdrawn its financing of the O'Connell Company.

[3] The Jewells were instrumental in setting up an informal trust fund for the O'Connell Company with contributions from other farmers in the community.

(third) deed of trust. And in August 1977, Jewell borrowed another $150,000 from the Bank which he again in turn loaned to O'Connell to enable the O'Connell Company to pay off an outstanding loan owed to the Bank.

George M. Jewell provided other assistance to the troubled O'Connell Company as well: he gave financial advice; he assisted in negotiations with O'Connell's suppliers to extend terms of payment; and he began to supply the O'Connell Company with large quantities of apples on credit alone.

2. *Financing of New O'Connell Company Plant*

~~In 1977, the Co-op embarked on a major project involving construction of a large dehydration facility to accommodate the expanding market for dehydrated apples. The plans called for a new continuous belt dehydration system known as a "Proctor-Schwartz" dryer. The Bank agreed to provide the necessary construction loan and long-term financing.[3] Upon completion of the facility in 1979, the Bank had loaned the Co-op $17.7 million.~~

~~Meanwhile, in~~ By 1977, the O'Connell Company had been ordered by a state regulatory agency to make substantial improvements in its waste water treatment facilities or to cease and desist operations. Confronted with the formidable competition presented by the new Co-op dehydration plant,[4] Dan O'Connell decided to construct his own new dehydrating facility. Following O'Connell's positive discussion with George M. Jewell, the latter then discussed the idea with Bill Sullivan, who was equally enthusiastic about the proposed project. In view of the Bank's

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[3] ~~Normally, the owner of a construction project obtains commitments for both a short-term construction loan and a long-term "take-out" loan secured by the property before proceeding with the project. The Bank gave the Co-op an oral commitment for the long-term financing followed up with a written commitment.~~

[4] In 1977, the Co-op embarked on the construction of a large dehydration facility to accommodate the expanding market for dehydrated apples. The Bank agreed to provide the necessary construction loan and long-term financing. Upon completion of the facility in 1979, the Bank had loaned the Co-op $17.7 million.

unwillingness to grant any further loans to the O'Connell Company, George M. Jewell undertook responsibility to obtain the necessary financing.

In December 1977, George M. Jewell and his wife, Betty, met with Sulluvan to discuss a $1 million loan for the project, payable over 20 years and to be secured by the new O'Connell plant. The Jewells were also to obtain an additional loan from the Bank to finance a lease-purchase arrangement whereby they would personally acquire ownership of ~~the~~ a new "Proctor-Schwartz" dehydrator and lease it back to the O'Connell Company. After the December 1977 meeting, George M. Jewell believed that the Bank would provide long-term financing on the O'Connell plant. The following month, upon receiving a firmer estimate of construction costs from Dan O'Connell, George M. Jewell again met with Sullivan and told him that O'Connell would need $1.2 million. Sullivan replied that the Bank would not make the loan if Dan O'Connell remained as manager of the new plant. Reacting with surprise, George M. Jewell responded that he would not "kick Dan out of his own business."

Concluding that Bank financing was a "dead issue," the Jewells began searching for alternative financing. They were soon able to obtain a $650,000 loan for the O'Connell project from North Coast Production Credit Association (PCA) evidenced by a seven-year promissory note (repayable at $10,000 per month), the maximum terms available from PCA in a single loan. George R. Jewell agreed to, and did, pay the monthly installments to PCA on behalf of the O'Connell Company. Construction of the new plant began in May 1978.

After the Jewells obtained the PCA loan, Sullivan told George M. Jewell that "the boys down below [Sullivan's superiors in the San Francisco regional credit office] kicked their butt for not taking the whole thing." George M. Jewell interpreted the statement to mean the Bank was interested in providing a long-term loan.

George M. Jewell knew that Sullivan did not have authority to approve large loans. (Sullivan's independent lending authority was apparently limited to $100,000.) Under the Bank's regular

procedures, the branch officials were required to prepare a credit report (form CR-115) to be forwarded to the regional credit office for review and approval by an authorized credit officer.

During the early part of 1978, George M. Jewell met with Sullivan frequently to discuss the long-term financing needed for the O'Connell plant. In April 1978, Dan O'Connell began furnishing Sullivan with periodic progress reports on the construction work. Sullivan suggested various design changes for the plant to avoid its possible classification as a specialized-use building operation. Sullivan knew that the regional credit office was reluctant to finance specialized buildings not readily convertible to other uses.

In the spring of 1978, George M. Jewell applied to the Bank for a $400,000 equipment loan to purchase the Proctor-Schwartz dehydrator. During the review by the Bank's regional credit office, Sullivan's superiors requested additional information concerning Jewell's equity interest in the O'Connell Company. As a consequence, Sullivan suggested to George M. Jewell that he should acquire controlling ownership of the O'Connell Company.

The equipment loan application was delayed for several months while the question of Jewell's ownership interest was being considered by Bank officials. In August, when the Bank had yet to approve the loan application, the Jewells returned to PCA. George M. Jewell then borrowed $370,000, and his son, $130,000, to finance the purchase of the Proctor-Schwartz dryer.[5] Thereafter, the Jewells modified their loan request to the Bank, which eventually approved a loan in the amount of $209,000 for equipment purchases for the O'Connell plant.

In November 1978, Sullivan invited the Jewells to a luncheon meeting with his superior, Norman Jensen. The two Bank officers visted the O'Connell construction site; neither man expressed any reservations about financing.

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[5] In April 1978, George M. Jewell had obtained a $300,000 credit line from PCA for equipment purchases for the O'Connell plant. He in turn loaned the money to the O'Connell Company.

In December 1978, Sullivan strongly urged George M. Jewell to obtain a controlling interest in the O'Connell Company, explaining that it was becoming "difficult if not impossible" for the Bank to continue investing in the O'Connell project without Jewell possessing a controlling interest. George M. Jewell, aware of Sullivan's interest in wanting to protect himself (Jewell) and the Bank, believed that unless he had some equity ownership in the O'Connell Company, the Bank would not provide long-term financing.

On January 7, 1979, George M. Jewell met with Mrs. Kruse and her family and explained the Bank's insistence that the Jewells have a controlling interest in the O'Connell Company as a condition to the continued financing of the dehydrating plant. She reluctantly agreed ~~"to sell"~~ to transfer a majority of her stock to George R. Jewell for $180 with the expectation that the stock would be returned once the Bank funded the long-term loan enabling the O'Connell Company to repay the Jewells.

The Jewells and Dan O'Connell anticipated that the PCA construction loan, together with the equipment loans, would be sufficient to pay the costs of the dehydrating plant.[6] However, by the spring of 1979, project cost over-runs required George M. Jewell to borrow additional sums from the Bank which he then loaned to the O'Connell Company. Thus, in March 1979, he first exhausted his $650,000 annual operating line of credit, then obtained Sullivan's approval for extended credit of an additional $445,000 or a total indebtedness of $1.095 million. Sullivan told George M. Jewell that something would be "worked out" at the end of the year.

The Jewells optimistically anticipated long-term financing which would permit consolidation of the several debts under a favorable repayment schedule amortized over a 20-year period. Still, they knew Sullivan himself lacked authority to approve a loan of that magnitude.

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[6] The total funds obtained exceeded $1.6 million: the four PCA loans aggregating $1.450 million and the Bank loan of $209,000.

In April 1979, Sullivan and his regional office superior, Norm Jensen, again visited the O'Connell construction site. Well aware of Sullivan's inablilty to approve the million dollar loan package, George M. Jewell was anxious to hear Jensen's reaction. Jensen reportedly stated "it was a beautiful plant, and '~~...~~we're going to be able to help [you].' " Jewell assumed that the statement indicated that the loan would be approved.

Sullivan shared a similar optimism of eventual loan approval by the regional credit office. In May 1979, as the project neared completion, Sullivan requested an appraisal of the O'Connell plant, the first step in preparing the customary CR-115. The Bank appraisal proved too low to justify a $1.9 million loan, motivating Sullivan to urge reconsideration by his superiors.

By August 1979, however, Sullivan realized that the regional credit office would not approve the loan. Sullivan soberly informed George M. Jewell that the Bank would be unable to provide long-term financing on the O'Connell plant. Shortly thereafter, i~~I~~n ~~late~~, September 1979, Sullivan was hospitalized due to a heart ailment and ~~shortly thereafter~~ retired on disability. ~~In October 1979, his replacement, Roger Bunch, followed up on Sullivan's actions by submitting a CR-115 to the regional credit office seeking approval of a $1.9 million O'Connell loan. The Jewells were unaware of Bunch's action. The loan was never approved, and the CR-115 was returned to the local branch.~~

Meanwhile, in November 1978, George R. Jewell had opted to build a "fresh pack" plant: a facility for storing high quality apples for future sale as edible fresh fruit. However, he did not obtain conventional financing (short-term construction financing and long-term payoff ~~"take-out"~~ loan) but elected instead to use his personal resources and annual operating line of credit to fund construction. When he applied to the Bank for a long-term real estate loan, Sullivan orally assured him the loan would be approved. In October 1979, the long-term loan was in fact approved by the Bank.

3. *Events Leading to Bankruptcy*

In January 1980, Roger Bunch, who succeeded Sullivan as local branch manager, approved George M. Jewell's $900,000

annual credit line and consolidated his short-term bank debts into an $850,000 loan payable over a four-year period. Bunch asked Jewell to execute deeds of trust on the Jewell Ranch as security for the loan. Jewell refused but did, however, sign an agreement not to encumber the Jewell Ranch.

In 1980, prices of processed apple products fell dramatically, due in large measure to a 1979 bumper apple crop which created a glut on the market. The O'Connell Company sustained heavy losses that year and was unable to repay the construction loans advanced by the Jewells. The O'Connell Company was likewise unable to pay the Jewells for thousands of tons of apples supplied to the O'Connell Company for processing.[7]

By 1980, the O'Connell Company was indebted to the Jewells in the amount of $2.7 million: $1 million in loans and $1.7 million for apples supplieds. The Jewells in turn were heavily indebted to their growers, to PCA, as well as to the Bank. Bunch concluded that George M. Jewell was so deeply in debt that "he wasn't going to get out." Accordingly, in September 1980, he summoned the Jewells to his office and announced that the Bank would not lend them any more funds.

In an effort to ease his financial dilemma, George M. Jewell agreed to place two "satellite" parcels of the Jewell Ranch on the market. His attempts to obtain financing from other lenders proved unsuccessful in view of the existing agreement not to encumber the Jewell Ranch. By November 1980, the O'Connell Company plant, along with the Proctor-Schwartz dryer owned by the Jewells, was placed on the market for liquidation.

On November 5, 1980, the Jewells responded to an invitation to meet with PCA and Bank officials in San Francisco. At the meeting, attorneys for PCA and the Bank strongly insisted that

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[7] George M. Jewell's long-standing commitment to pay his growers at the prices posted earlier in the season produced a negative spiral effect: the Jewells' commitment to pay their growers above-market prices resulted in commensurately higher costs of supplies to the O'Connell Company now controlled by the Jewells.

the Jewells liquidate their properties in order to repay the outstanding loans or risk foreclosure proceedings.

George M. Jewell broke down emotionally prompting Bunch to put his arm around him with the verbalized assurance, "'Don't worry, George, we'll take care of you.'" During the return trip to Sebastopol, Bunch told George M. Jewell that if he would give the Bank deeds of trust on the Jewell properties as well as the proceeds derived from the sale of properties, the Bank would in turn pay the growers and protect him from the demands of PCA. A few days later, George M. Jewell and his wife executed and delivered to the Bank deeds of trust to all their real property and security agreements on their equipment.

Although the Bank never initiated foreclosure proceedings on the Jewell properties, it did insist that the Jewells liquidate the O'Connell properties to provide funds to pay off the outstanding bank loans. Meanwhile, PCA also began pressing its demands on the Jewells and the O'Connell Company for immediate payment of the outstanding unpaid loans. Indeed, PCA threatened to file a petition for involuntary bankruptcy of the Jewells in order to invalidate the transfer of their properties to the Bank.

On November 25, 1980, Mrs. Kruse filed a fraud action against both the Jewells and the Bank seeking damages and equitable relief. Two months later, the Bank received $381,000 from the sale of the two satellite parcels and released a portion of the funds to pay the senior Jewells' attorney fees in contemplation of a voluntary reorganization petition in bankruptcy, ultimately filed by the senior Jewells on January 28, 1981. George R. Jewell filed a Chapter 11 petition the following May.

The culminated events raised doubts in the Bank officials whether to distribute the proceeds to the Jewells' creditors, including PCA and the growers, as Bunch had promised. However, the Bank eventually turned over the deeds of trust as well as the sales proceeds to the trustee-in-bankruptcy.

In July 1981, the fresh pack plant was destroyed by fire; the fire insurance proceeds were applied by the Bank to George R. Jewell's outstanding loan. The final chapter in the tragic eco-

nomic collapse was written in January 1982 when the O'Connell Company also filed bankruptcy.

DISCUSSION

The Bank's main argument on appeal is that the judgment is unsupported by the record. Accordingly, the scope of our review begins and ends with the determination whether, on the entire record, there is any substantial evidence, contraticted or uncontradicted, which will support the conclusions reached by the jury. (*Estate of Leslie* (1984) 37 Cal.3d 186, 201; *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64.) In reviewing the voluminous record, we must examine all factual matters in the light most favorable to the prevailing parties and resolve all conflicts in support of the judgment. (*Estate of Leslie, supra,* 37 Cal.3d 186; *Nestle v. City of Santa Monica, supra,* 6 Cal.3d 920, 925-926.)

"Substantial" evidence, however, is not synonymous with "any" evidence. To constitute sufficient substantiality to support the verdict, the evidence must be "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed* (1952) 11 Cal.App.2d 638, 644; see also *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164; *Yancey v. State Personnel Bd.* (1985) 167 Cal.App.3d 478, 482-483; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.)

As we will explain, our review of the whole record in light of such governing principles discloses an absence of proof sufficient to establish the essential elements of the asserted causes of action. Therefore, we are compelled to reverse the judgments.

I.

JEWELLS' CROSS-COMPLAINT

The Jewells' cross-complaint against the Bank asserted theories of fraud (actual and constructive) and bad faith denial of the existence of a contract. In essence, the Jewells claimed that the Bank wrongfully induced them to borrow heavily in order to

finance the O'Connell Company; that once the Jewells were hopelessly overextended, the Bank reneged on its promise to provide long-term financing to the O'Connell Company which would have enabled it to repay the Jewells; further, that after obtaining the Jewells' assets, the Bank betrayed them by failing to pay their other creditors (notably, PCA and the growers).

The jury awarded George M. and Betty Jewell $12.75 million and George R. Jewell $4.5 million in compensatory damages based upon special verdicts finding fraud and bad faith denial of a contract. The jury also awarded the Jewells $20 million in punitive damages. We will conclude the verdicts are legally insupportable.

A.

Failure to Disclose

The Jewells' claims of actual and constructive fraud rests on a theory that the Bank had a duty to disclose certain information before making the requested loans; that had the Bank made the required full disclosure, the Jewells would have refrained from repeatedly borrowing the large sums of money. Thus, they contend, the Bank's conduct in wrongfully inducing them to obtain loans while fraudulently concealing material facts constituted actionable fraud.

Ordinarily, failure to disclose material facts known only to one party is not actionable fraud unless there is a fiduciary or confidential relationship imposing a duty to disclose. (Civ. Code, § 1710, subd. (3); 4 Witkin, Summary of Cal. Law, Torts (8th ed. 1974) §§ 459-460, pp. 2724-2725.) The Bank vigorously denies the existence of any fiduciary duty or any breach thereof. Moreover, the Bank claims, any fiduciary relationship that arguably existed (see generally *Rutherford v. Rideout Bank* (1938) 11 Cal.2d 497 [bank's confidential relationship with depositer-borrower]; *Commercial Cotton Co. v. United California Bank* (1985) 163 Cal.App.3d 511, 516 [bank's "quasi-fiduciary" relationship with checking account holder]) was limited to the 1976-1977 loan transactions and terminated by reason of George M.

Jewell's exercise of his own independent business judgment and action in connection with the 1978-1979 financial transactions.

We need not navigate these murky waters. As will appear from our discussion, even assuming some duty to disclose existed, the Jewells have nonetheless failed to establish any cause of action based upon fraud.

(l) *The 1976-1977 O'Connell Loans*

The Jewells first complain that in making the loans used to save the O'Connell Company ($150,000 to satisfy the Taylor-Doyle judgments; $114,000 for equipment purchases; and 150,000 to pay an old bank debt), the Bank failed to disclose: 1) critical information regarding the O'Connell Company's banking history; 2) its low opinion of Dan O'Connell as a business manager; and 3) the benefits it derived as a result of the Jewells' loans to the O'Connell Company. Moreover, they charge, the Bank also failed to advise the Jewells to seek independent legal advice (due to the Bank's "conflicting" interests) or to inform them of the resulting impact on their own financial condition.

But there is no solid, credible evidence that the financial losses ~~any damages arguably~~ sustained by the Jewells were proximately caused by the 1976-1977 loans. The loans made were ~~adequately~~ secured by deeds of trust on O'Connell properties.[8] During the years 1976-1980, the O'Connell Company paid to the Jewells a total of $1.7 million. Of that amount, $296,000 was applied to the notes payable (which included a 1 percent surcharge over the Jewells' corresponding interest rate paid to the bank ~~debt service~~). By the end of 1977, the Jewells had fully repaid the 1976 loans and open credit lines and were only indebted for the 1977 $150,000 loan used to pay off O'Connell Company's bank loan;

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[8] As earlier noted, the first loan of $150,000 was secured by a deed of trust junior to the Bank's trust deed, ~~securing a balance of $139,000, leaving $161,000 in unencumbered value as security.~~ In August 1977, when George M. Jewell paid off the old bank loan, the Bank's senior security was extinguished.

Later, when the construction project began, the PCA loan paid off George M. Jewell's debt to the Bank, and his deed of trust was subordinated to the deed of trust held by PCA.

and that debt was cleared in March 1978. Thus, at the end of 1978, the Jewells were free from debt to the Bank except for the $209,000 equipment loan.

In point of unassailable fact, the Jewells' precarious economic condition in 1981 directly resulted from ~~several~~ significant independent intervening factors: 1) the heavy indebtedness incurred in 1978-1979 in conjunction with the construction of the O'Connell dehydrating plant; 2) the O'Connell Company's failure to repay the construction funds borrowed from the Jewells; 3) the devastating losses suffered in the 1979-1980 apple season as a consequence of paying above-market prices to their growers; 4) the O'Connell Company's failure to repay nearly $2 million owed to the Jewells for apples delivered during 1978-1980 for processing; and 5) the bankruptcy in 1980 of a major customer of the Jewells rendering a $232,000 receivable uncollectible. The record convincingly demonstrates that the 1976-1977 loans made to finance the O'Connell Company were ~~neither a contributing nor~~ not a substantial factor in the Jewells' financial collapse.

(2) *1978-1979 Loans for Plant Expansion*

In 1978 and 1979, the Jewells borrowed well over $1 million in short-term bank loans on the assumption the Bank ultimately would give a long-term loan on the O'Connell plant. The Jewells contend the Bank fraudulently induced them to undertake the short-term borrowing without disclosing the possibility ~~possible likelihood~~ that their request for long-term financing would be denied.

Our review of the record fails to disclose ~~uncover~~ evidence of sufficient substantiality to establish the essential element of justifiable reliance.[9] Testimony concerning one's own reliance is le-

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[9] We find the Jewells' companion argument of culpable nondisclosure of a May 1978 internal report predicting a decline in apple acreage in Sonoma County somewhat ingenuous. Jewell's testimony that had he known of this report, he would never have become involved in the O'Connell project, defies ~~lacks~~ credibility.

The report cited the same statistics contained in an earlier report that Jewell read. The first report, however, explained why those statistics were misleading in that new plantings made the yield per acre greater

gally insufficient evidence if such reliance is without justification (Prosser & Keeton, The Law of Torts (5th ed. 1984) § 108, p. 750); a party plaintiff's misguided belief or guileless action ~~mindless conduct~~ in relying on a statement on which no reasonable person would rely is not justifiable reliance. (*Ibid.*) "If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, . . . he will be denied recovery." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415; see also *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 5603.) Quite simply, the Jewells' hopeful expectations cannot be equated with the necessary justifiable reliance.

When the Bank in January 1978 denied the Jewells' request for long-term (construction) financing on the O'Connell plant, they went elsewhere (to PCA). Certainly, the Jewells were aware there could be no assurance that any of their requests to the Bank for long-term financing would be granted.

Moreover, George M. Jewell knew of Sullivan's limited lending authority and that his request for such a large loan required the approval of Sullivan's superiors. Obviously, knowledge that the loan request required such approval implies an awareness that any such request could be denied. It follows, inescapably, that Jewell could not have reasonably relied on the Bank's failure to disclose that the loan might be denied.[10]

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and land use restrictions protected agricultural land. It is unreasonable to think that the Jewells' enthusiasm and confidence about the O'Connell dehydrating plant would have been shattered by the conclusory statement in the second report that Sonoma County would likely "lose some additional apple acreage during the next 5 years," particularly where the first report noted the same reduction in acreage but explained a favorable outlook for an increased apple supply.

[10] As one of its claims of error, the Bank underscores the trial court's effective deletion of the requirement of justifiable reliance in the jury instruction given, viz: "Where there is a fiduciary relationship, the one to whom the fiduciary relationship, the one to whom the fiduciary relationship is owed has the right to rely on the representation made to him by the fiduciary without the duty of further inquiry."

We agree that this instruction erroneously permitted the jury to find fraud even though George M. Jewell knew Sullivan lacked authority to

The Jewells seek to support a finding of reliance by pointing to Jensen's April 1979 site visit and saccharine comments which, they claim, lulled them into a false sense of security and created an obligation in Jensen to dispel any illusion that the loan would be forthcoming.

Yet by April 1979, construction on the O'Connell plant was nearly completed. Given the Bank's earlier refusal to finance the O'Connell plant and the Jewells subsequent recourse to the seven- year loan obtained from PCA, the Jewells' assertion—that they would have avoided any financial entanglement in the O'Connell construction had they known long-term financing might be denied—cannot be logically accepted. Indeed, actual construction of the dehydrating plant began in May 1978, notwithstanding the fact that long-term financing had not yet been procured.

The Jewells further claim they reasonably believed an "oral" commitment had been made, especially in light of the Bank's prior oral commitments to the Co-op and to George R. Jewell, followed up with long-term (take-out) loans. But there is no evidence the Jewells even knew of the oral commitment made to the Co-op. And the financing on the fresh pack plant occurred in October 1979, after the Jewells were informed a long-term loan on the O'Connell plant would not be made.[11]

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commit to long-term financing. The correct rule charges the beneficiary of a fiduciary relationship with investigating facts of which he has actual notice. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 875; *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 131, fn. 12.)

[11] Nor could it be argued that the Bank's silence deterred the Jewells from seeking financing alternatives. As noted, in August 1979, Sullivan told George M. Jewell the Bank would not grant a long-term loan. But it was not until a year later (October 1980) that the Jewells began to investigate alternative resources for the required financing. By then, their negotiating position was considerably weakened: they had lost their security, their deeds of trust on the O'Connell properties having been assigned to the Bank in connection with the $850,000 loan to George M. Jewell, and the Jewells had also signed the non-encumbrance agreement thereby effectively eliminating their ranch property as loan collateral.

~~Nor can the Jewells successfully argue the Bank's silence deterred them from seeking financing alternatives. In August 1979, Sullivan told George M. Jewell the Bank would not grant a long-term loan. But it was not until a year later (October 1980) that the Jewells began to investigate alternative resources for the required financing. By then, their negotiating position was considerably weakened: they had lost their security, their deeds of trust on the O'Connell properties having been assigned to the Bank in connection with the $850,000 loan to George M. Jewell, and the Jewells had also signed the non-encumbrance agreement thereby effectively eliminating their ranch property as loan collateral.~~

(3) *Jewells' Ranch Loan*

The Jewells further posit their claim of fraudulent inducement to engage in short-term borrowing on the Bank's alleged promise to make a long-term loan secured by the Jewells' ranch, if ever necessary. They construct their ancillary claim largely on statements made by Sullivan to George M. Jewell assuring such possibility, first in August 1977, when George M. Jewell borrowed $150,000 from the Bank to pay off the O'Connell Company's old bank debt; and again in December 1977, when the two men were discussing the probable terms of a long-term loan on the O'Connell plant.

Assuming the substance of Sullivan's statements could arguable be construed as positive assurances, again we find the evidence of justifiable reliance wholly insufficient. When discussions resumed in 1978 concerning long-term financing for the O'Connell plant, Sullivan openly suggested the use of the ranch as security. George M. Jewell ~~flatly~~ refused, saying he did not owe the apple industry that much. In 1980, when Bunch arranged the consolidated $850,000 four-year loan, Bunch made a similar suggestion which the Jewells ~~again refused~~ rejected because that loan was not the long-term loan they desired. Finally, at the time a short-term loan was arranged for the Jewells to pay their growers, Bunch discussed the possibility of taking the Jewell ranch for collateral and was again met with an emphatic "no." George M. Jewell's persistent refusal to encumber the Jewell ranch ~~itself~~ belies the claim now asserted that the Jewells would not have undertaken the initial borrowing if they had known they

could not thereafter obtain new financing secured by the ranch ~~alone.~~

Moreover, it is clear from the record that it was not until 1980, *after* the Bank cut off any more unsecured loans, that the Jewells attempted to obtain a real estate loan on the Jewell Ranch. By then, of course, their circumstances had changed dramatically. By the end of 1977, the Jewells' only outstanding indebtedness to the Bank was the $150,000 loan used to pay off the O'Connell Company's bank loan. By 1980, in marked contrast, the Jewells' financial outlook was bleak indeed: not only did they owe the Bank over $1.3 million, they also owed PCA $1 million and their apple growers $985,000. As of January 1980, the Jewell Ranch was valued at $1.337 million.[10]

Obviously, by that time, the Bank had decided it was not willing to lend any more funds to the Jewells. The Jewells could not reasonably have expected that the Bank's promise or assurances of a loan secured by the Jewell Ranch would extend indefinitely, notwithstanding such a staggering debt pricture.

B. *Denial of Long-Term Financing*

The Jewells' principal grievance against the Bank is its refusal to come to their financial rescue by providing long-term financing. the Bank's failure to do so, they strongly argue, constituted a bad faith denial of a contract. This theory of liability is equally devoid of supporting evidence in the record before us.

Tort liability based on bad faith denial of a contract was first recognized in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1983) Cal.3d 752. Our highest court, while reiterating established principles governing a breach of the covenant of good faith and fair dealing in the context of a contract remedy, declined to rule on the question whether such breach gave rise to a tort

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[10] The Jewells also owned equipment and inventory, giving them a net worth of $4 million. But the value of their real estate did not approach the level of their indebtedness.

action in the contex: of an ordinary commercial contract.[11] Instead, the court fashioned a distincly different form of relief: "a party to a contract may incur tort remedies when, *in addition to breaching the contract* it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." (36 Cal.3d at 769, emphasis added.)

Thus, the cause of action in tort arises when the party not only breaches the contract but also denies in bad faith that a contract even exists. The inherent precondition to such a tort claim is the existence and breach of an enforceable contract. (See *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 538-539; *Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 321.)

In *Seaman's,* there was no question that a valid (dealership) contract had been formed. The Pivotal circumstance underlying the tortious conduct was the "contracting party seeking to avoid all liability on a meritorious contract claim by adopting a 'stone-wall' position ('see you in court') without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics." (36 Cal.3d at pp. 769-770, emphasis added.)

In the subsequent cases applying *Seaman's,* the formation of a contractual relationship was *not* in dispute; rather, tort liability, where found, was based on the bad faith assertion on an invalid defense by the party in breach. (See, e.g., *Commercial Cotton Co. v. United California Bank, supra,* 163 Cal.App.3d 511 [statute of limitations asserted by Bank against checking account holder]; *Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal.App.3d 241 [~~employer's assertion of~~ false grounds asserted by employer for wrongful discharge of employee].)

But the rule announced in *Seaman's,* explicated in its progeny, is not applicable herein. There was no contract, oral or written,

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[11] More recently, the Supreme Court has declared that "not every breach of the covenant of good faith and fair dealing in a commercial contract gives rise to an action in tort." (*Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 497, fn. 11.)

between the Bank and the Jewells providing for long-term financing. Nor, indeed, have the Jewells alleged a cause of action for breach of contract by the Bank. Instead, they seek to impose tort liability on the Bank through the bare allegation of a bad faith *denial* of a contract. Neither the allegation nor its proof comes within the *Seaman's* contours of tort liability.

The jury was correctly instructed, and obviously found, that an underlying contract was a prerequisite to recovery. But the jury's special finding of liability on the asserted theory of bad faith denial of a contract is wholly unsupported in the record. To bolster their claim that the Bank was "committed" to a long-term loan on the O'Connell plant, the Jewells point to the following circumstances: ~~the fact~~ the Bank granted them the equipment loan for the plant, which under ordinary bank practices would presuppose the extension of long-term financing; Jensen's favorable comments during his April 1979 site visit and his reported urging of long-term financing; Sullivan's stated intention (to his superiors) to make a "RE loan for packing shed, dehydrator, etc.," coupled with the later appraisal request informing regional officials that the proposed O'Connell loan proceeds would ~~be used to~~ repay the Jewells~~, who in turn would~~ enabling them to discharge their debts ~~owed~~ to the Bank and PCA; and, lastly, statements ~~contained~~ in the Jewell's ~~supporting~~ credit reports that the unsecured short-term loans would be repaid by "financing of real estate" or "RE loan for packing shed dehydrator etc."[12]

However, the Bank points out, correctly we believe, that the circumstances and events highlighted provide no basis to establish that a binding agreement was formed. ~~nothing of probative value as to the essential elements of a binding agreement, namely, the~~

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[12] Over the Bank's objection, the trial court permitted expert testimony that Sullivan's actions and the Bank's conduct gave rise, inter alia, to an implied commitment of long-term financing. The Bank renews the objection on appeal, strongly contending that the irrelevant opinions of law prejudicially tainted the validity fo the jury verdicts. In view of our determination (*post*), we need not discuss the questionable ruling.

~~amount of the loan, the rate of interest, the terms of repayment, applicable loan fees and charges.~~

It is, of course, elemental that creation of a valid contract requires mutual assent ~~to definite terms,~~ ordinarily evidenced by an offer and acceptance. (See generally Civ. Code, §§ 1550, 1565; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 128, p. 153.) Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement. "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." (Rest.2d Contracts, § 26, p. 75.)

As the distinguished commentator explains: "When the evidence clearly shows . . . that the only (and the complete) subject matter that is under consideration is left for further negotiation and agreement, there is no contract, not for vagueness or indefiniteness of terms but for lack of any terms." (Corbin on Contracts, § 95, p. 397.)

Here, the entire subject matter under consideration—the long-term loan—was at best left open to future negotiations and agreement. George M. Jewell, fully aware of Sullivan's limited lending authority, was informed that Sullivan was "working on" obtaining the necessary approval from his superiors.[13] The Jewells' hopeful expectation that a loan agreement would eventually be reached was simply that: an expectation. ~~None of the essential terms were ever decided upon.~~ The Bank's manifestation of assent never materialized; and no agreement was ever formed.

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[13] The fallacy of the reasoning advanced by the Jewells is inherent in their unjustified assumption that Sullivan's repeated assurances that things would be "worked out" constituted a binding loan commitment. However, as previously discussed, assurances to work things out amount to no more than promises to continue negotiations looking to a future agreement.

Under such circumstances, the Bank was under no legal obligation or commitment to make a long-term loan.[14]

Nor can the credit report (CR-115) submitted by the local branch ~~Bunch~~ in October 1979 be transformed into a contract, as contended.[15] That report was submitted without the Jewells' knowledge well after Sullivan notified the Jewells that no loan was forthcoming. Clearly, the unilateral submission under such circumstances could not constitute a mutual agreement between the parties on the terms and conditions proposed in that document.

The related theory that an agreement existed to extend financing on the Jewell ranch finds even less support in the record. ~~Once again.~~ There is a complete lacuna in the proof of essential terms of the claimed loan agreement: namely, the amount of the loan, the rate of interest, the terms of repayment, applicable loan fees and charges. The suggest~~ed~~ion ~~inference~~—that terms similar to those contained in the 1979 credit report would apply on the ranch loan—is both illogical and unreasonable. First, the proposed O'Connell plant loan was to provide long-term refinancing of the short-term construction loans; in contrast, the ranch loan discussions focused on the future "needs," if any, of the Jewells. As noted, by 1980, the Jewells were seriously overextended with the Bank, their growers and PCA. Yet no specific financial needs, loan amount or relevant terms were ever discussed. Moreover, George M. Jewell had indicated unequivocally on at least two earlier occasions that the ranch would not be used as security for a

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[14] ~~The Jewells' alternate theory of promissory estoppel (grounded on the assurance implied in making the short-term loans) is unpersuasive. Not only did they fail to assert such theory below, an omission generally fatal to review on appeal, but in any case, it affords no comfort since estoppel obviates only the need for consideration, not the necessary promise. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672. *Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890-891.)~~

[15] In October 1979, a local ranch official submitted a CR-115 to the regional credit office seeking approval of a $1.9 million O'Connell loan. The Jewells were unaware of this action. The loan was never approved, and the CR-115 was eventually returned to the local branch.

bank loan. Quite clearly, there is no competent evidence of the essential ingredients of a binding agreement to make a long-term loan secured by the ranch itself.

Inevitably, we must conclude the Jewells' reliance on a tort theory of bad faith *denial* of a contract to support the judgment is wholly misplaced. Such a theory of relief is unavailable where, as here, no underlying agreement exists. Without proof of an underlying agreement, tort liability may not be imposed on the Bank for its failure to provide long-term financing to the O'Connells or to the Jewells.

C.

Failure to Distribute Assets

Relying on similar theories of fraud and bad faith denial of a contract, the Jewells contend that the Bank's failure to apply the satellite parcels' sales proceeds to the debt owed their growers or PCA, as promised by Bunch, rendered the Bank liable in damages. Had ~~they~~ the Jewells known the Bank would ultimately refuse to honor its commitment to repay ~~the Jewells~~ their creditors, it is argued, ~~they~~ the Jewells would never have agreed to assign trust deeds on their properties in the Bank's favor.

It is axiomatic that to obtain a recovery for fraud, a claimant must prove, inter alia, that damages were sustained as a proximate cause of the fraudulent conduct. (Prosser & Keeton, Law of Torts, *supra*, § 110, p. 767.) Assuming, arguendo, a claimant's ~~justifiable~~ reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes. (~~Ibid.,~~ Harper, James & Gray, The Law of Torts (2d ed. 1986) § 7.13, p. 465 ; see also Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal.App.3d 888, 892-893.) The absence of the necessary element of causation, we conclude, is fatal to ~~their~~ the Jewells' claim.

Even if Bunch's promise were false and fraudulent, the property loss sustained by the Jewells was not the product of Bunch's false promise but was the direct result of their self-created indebtedness. Put differently, even had they not assigned the trust deeds,

their property would still have been subject to the satisfaction of the existing claims of their creditors, ~~they still would have lost their property to the creditors.~~

Moreover, had the Bank distributed the proceeds to PCA and the growers, undoubtedly such distribution would have been successfully challenged by the bankruptcy trustee as an illegal preferential distribution. (See 11 U.S.C. § 547(b).) As it happened, the trust deeds and sales proceeds were eventually turned over to the bankruptcy trustee as part of the estate to be administered for the benefit of creditors. Thus, PCA and the growers stand in no less favorable position than if the Bank had made a voidable preferential distribution to them.

Understandably, the Jewells complain of the damages occasioned by the Bank's nearly three-year delay in turning over the assets to the trustee-in-bankruptcy.[15]

But the appropriate forum to seek recovery of damages in the form of attorney fees (as costs against the Bank) was the bankruptcy proceeding itself. Once a bankruptcy action is commenced, the bankruptcy court has exclusive jurisdiction over the debtor's property. (28 U.S.C. § 1334(ed), formerly § 1471(e).) Thus, it is within the exclusive jurisdiction of the bankruptcy court to recover or restore assets belonging to the estate. (1 Cowans, Bankruptcy Law and Practice (1987) § 1.2(k), pp. 33- 34; 9 Am. Jur.2d, Bankruptcy, §§ 487-489, pp. 793-797.) As part of such action, the trustee may also recover prejudgment interest, costs, attorney fees and damages for loss of use of the property. (Bankruptcy Rule 7054.) Because the damages here asserted—attorney fees incurred due to the Bank's intransigence—were recoverable in the bankruptcy proceeding, the Jewells cannot now split their cause of action in an attempt to recover them in this lawsuit. (See *Hatch v. Bank of America* (1960) 182 Cal.App.2d 206, 210 [plaintiff cannot maintain a second action for damages (loss of use) following quiet title and possession action].)

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[15] Apparently, the "turn-over" order required years of litigation and substantial costs in attorney fees.

Our analysis herein of the Jewells' fraud claim applies with equal force to the tandem claim of bad faith denial of a contract. Though the Jewells characterize their action in terms of a tort action, the gravamen of the claim asserted is a *breach* of contract. But even so considered, no merit is discerned: the Bank ultimately, though belatedly, performed in turning over the assets to the Jewells' legal representative, the trustee-in-bankruptcy. However, as already determined, the attorney fees and costs incurred in effecting the involuntary transfer are not recoverable in this subsequent action.

* * *

In conclusion, we hold that on the record before us the Jewells have failed to prove the Bank's liability in damages on the basis of fraud or bad faith denial of a contract. Accordingly, the jury's verdicts for compensatory damages cannot stand. And since the claims for punitive damages are mere incidents to the causes of action and cannot constitute the basis thereof (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801-802; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 391), the respective awards for such damages must be similarly vacated and set aside.

II.

KRUSE COMPLAINT

Mrs. Kruse's claim against the Bank was based solely on the Bank's conduct which contributed to her decision to transfer her controlling stock interest in the O'Connell Company to the Jewell family in 1979. The theory advanced at trial was that the Bank fraudulently induced Mrs. Kruse to execute the transfer of stock by misrepresenting to Mrs. Kruse that long-term financing would then be provided. Mrs. Kruse was allegedly injured by the stock transfer because by relinquishing control of her company to the Jewells, she was thereby prevented from obtaining a long-term loan elsewhere.[16]

[16] Mrs. Kruse argued below that the Bank's improper conduct was motivated by a desire to destroy the O'Connell Company, a competitor of the Co-op for the supply of available apples. It is noteworthy that on

The jury awarded Mrs. Kruse $2.77 million in compensatory damages: $2.67 million on alternate theories of fraud and intentional interference with prospective business advantage and $100,000 for emotional distress. The jury also awarded $6.675 million in punitive damages. We find the verdict likewise unsupported by the evidence in the record.

A.

Fraud

In order to uphold the verdict on the grounds of fraud, it must be shown by the evidence that the plaintiff changed her position in justified reliance on the fraudulent misrepresentation resulting in damage. (Civ. Code, § 1709; 4 Witkin, Summary of Cal. Law (8th ed 1974) Tort. § 479, p. 2738; see also 37 Am.Jur.2d, Fraud and Deceit, § 223, pp. 297-299,) The change of position herein was the stock transfer upon the mistaken expectation that a long-term loan would be given. Mrs. Kruse was entitled, of course, to rescind the stock transfer when the long-term financing did not materialize. (Civ. Code, § 1689.) And a claim for rescission against the Jewells was initially pursued. However, by the time of trial, she had abandoned her claims against the Jewells for the now worthless stock.

Mrs. Kruse claimed two species of damages against the Bank as a result of the stock transfer: 1) the difference between the fair market value of her stock ($490,393) and the amount she received for it ($180); and 2) anticipated profits of the O'Connell Company, payable as dividends, which were lost because the O'Connell Company failed to receive the expected long-term loan. On appeal she reiterates her claim of damage by virtue of the "loss of the fair market value of the stock at the time it was pledged to the Jewells and the returns which it would have generated had the long-term financing been provided."

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the Bank's motion for new trial, however, the trial court found "the evidence is not sufficient to show that the wrongful conduct of the defendant was motivated by a corporate plan or scheme to put the parties out of business."

As to the diminished value theory of damages, the Bank correctly points out that it played no part in setting the price paid for the stock and any resulting loss of value. The nominal $180 payment by George R. Jewell was determined in the course of negotiations on January 7, 1979, between George M. Jewell, Mrs. Kruse and her son, Dan O'Connell. It is reasonable to conclude that Mrs. Kruse acquiesced in the nominal sum fixed with the expectation of facilitating repurchase at some future time. The price paid for the stock was totally independent of the asserted misrepresentations by the Bank. We are furnished no evidence from the record supporting a finding of a causal connection between the alleged damages and the Bank's fraudulent conduct.

It seems obvious that Mrs. Kruse's central complaint is not the Bank's fraudulent inducement but rather the Bank's refusal to provide long-term financing for the O'Connell Company. Indeed, her brief explains her position that she was damaged "not as the Bank asserts because of the nominal price of $180, but because the Bank repudiated its commitment to fund a long-term loan. . . . [¶] . . . Had the Bank lived up to its promise [of long-term financing], Mrs. Kruse would not have been damaged."

Yet, contrary to her assertions, the record contains no evidence of a "commitment" or "promise" to make such long-term loan. ~~A~~Unlike the Jewells, at trial Mrs. Kruse conceded there was *no contract* to lend money, since *no terms had been negotiated.* The thrust of her argument is directed to the Bank's conduct in 1977 and 1978 as the basis of an implied representation that the Bank would fund a long-term loan when in fact it had no intention to do so. ~~That~~ The argument falls under its own weight, the record reflecting an absence of any substantial evidence supporting either an ~~enforceable~~ implied promise ~~or commitment~~ to lend money or the essential requirement of justifiable reliance.

At most, Sullivan expressed interest in securing the desired financing. As previously discussed, he and George M. Jewell engaged in ongoing discussions and negotiations for the purpose of obtaining the necessary loan approval from Sullivan's superiors, a prospect long incubating within George M. Jewell's hopeful expectation, an optimism he quickly shared ~~by~~ with Mrs. Kruse

and her son. Yet, George M. Jewell's optimism was unfounded. He knew that Sullivan lacked authority to approve the sizable loan necessary to fund the dehydration plant. The very premise of their frequent discussions was the need to obtain the approval of the regional office. In fact, the stock transfer in response to Sullivan's request was purportedly a step towards facilitating the needed approval. It ~~seems~~ is indisputable that the regional office's approval was recognized by both the Jewells and the O'Connells as a condition precedent to the Bank's expected commitment to extend long-term financing. The evidence of such contingent expectations and negotiations is far removed from a binding promise to lend money and also negates any reasonable reliance upon the Bank's alleged misrepresentations.

Moreover, the argument advanced is fatally defective for other reasons. We note~~, too,~~ that Mrs. Kruse's position is in polar opposition to that advanced by the Jewells. Mrs. Kruse claims that the Bank was bent on bankrupting the O'Connell enterprise in order to save the Co-op, the Bank's largest customer; that in furtherance of that design, the Bank secretly never intended to provide the needed financing to the O'Connell Company; and that the assurances given to George M. Jewell were knowingly false and calculated to deceive him. The Jewells, on the other hand, claim the Bank wanted the O'Connell Company to survive economically and used the Jewells as a vehicle to accomplish that goal. (Part I.A., *ante*.) The Jewells argue that the Bank was fully committed to providing the financing but then later repudiated its commitment. (Part I.B., *ante*.)

Thus, the jury's findings in favor of both Mrs. Kruse and the Jewells appear to be internally inconsistent and mutually exclusive: if the jury found that the Bank entered into an enforceable contract with the Jewells to provide financing for the O'Connell Company, then logically it could not also find that the Bank officials gave false assurances to Mrs. Kruse. Conversely, if the jury found the Bank falsely promised Mrs. Kruse to fund the long-term loan, it could not have simultaneously found that the Bank had actually agreed to make the loan. Such a material inconsistency in the jury's verdicts alone mandates reversal of the judgment.

But, in any event even if we were to view the Bank's statements and conduct as rising to the level of an enforceable promise to lend money, no competent evidence is shown of any causal connection between the change of position by Mrs. Kruse and her claimed damages. Her assertion that the Bank's "prolonged deceit" inducing her stock transfer "led to the financial ruin of them all" is ~~sheer~~ nonsense. The stock transfer in no way imaginable caused the collapse of the O'Connell Company or, for that matter, the Jewells' own dire circumstances.

The damage which resulted from the lack of financing was the termination of the O'Connell Company's apple processing business, and that damage was to the *corporation*, not to Mrs. Kruse individually. The trial court properly precluded Mrs. Kruse from recovering damages for any injury to the corporation, as she lacks standing to recover for injuries to the company itself.[17] (*Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530; see also *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107; *Smith v. Tele-Communication, Inc.* (1982) 134 Cal.App.3d 338, 342- 343.)

We conclude that there is no evidence of a substantial nature that either the transfer of stock or the attendant change of position by Mrs. Kruse was a proximate cause of her financial loss.

B.

Interference with Economic Advantage

Mrs. Kruse's claim of intentional interference with prospective economic advantage, while not well formulated, rests on a theory ~~(as argued to the jury)~~ that ~~Bunch's action in~~ the Bank's refusal to provide long-term financing and its efforts to liquidate~~ing~~ the O'Connell Company destructively interfered with the relationship between Mrs. Kruse and the corporation. But the theory asserted amounts to nothing more than an indirect attempt to assert

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[17] Parenthetically, we have taken judicial notice that the trustee-in-bankruptcy has filed a lawsuit in federal court against the Bank seeking damages in behalf of the corporate entity, the O'Connell Company.

damages to the corporation which Mrs. Kruse lacked standing to do. (*Sutter v. General Petroleum Corp., supra,* 28 Cal.2d at p. 530.)

In her brief, she declares that the interference occurred "when the Bank induced plaintiff to pledge her stock to the Jewell family by promising that it would finance the O'Connell project . . . [which it] refused to do . . . leaving [her] powerless to regain control of her company."

To the extent that the argued interference was directed to the unkept promise of long-term financing, Mrs. Kruse failed to ~~state~~ establish a cause of action. The tort of intentional interference with economic advantage affords a remedy for wrongful interference with an economic relationship by a *third party*. (*Dryden v. Tri-Valley Growers* (1977, 65 Cal.App.3d 990, 998-999; *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288; see also Prosser & Keeton. The Law of Torts, *supra*, § 129, p. 978; Rest.2d Torts, § 766.) Here, however, only two parties were involved: the O'Connell Company, anxiously hoping for the bank loan, and the Bank itself which, through a convoluted reasoning process, is charged with interference by denying the loan.

~~Nor does t~~The presence of the Jewells does not fulfill the third party requirement. In the context presented, the Bank's alleged promise was to provide long-term financing directly to the O'Connell Company, *not* to the Jewells. And, at the risk of repetition, it bears emphasis that George M. Jewell consistently rejected any suggestion to obtain financing by encumbering the ranch.

While wrongful interference with one's *own* business may arguably constitute a breach of contract, it cannot serve as the basis of the claimed tort liability. Indeed, interference with business relations is ordinarily privileged if one has a financial interest in one of the parties. (*Culcal Stylco, Inc. v. Vornado* (1972) 26 Cal.App.3d 879, 882; Rest.2d Torts, § 769.) The Bank's refusal to extend long-term financing to the O'Connell Company, even if that refusal amounted to an outright repudia-

tion of a firm commitment, does not give rise to tort liability for interference with an economic advantage.[18]

Mrs. Kruse alternatively claims the Bank wrongfully interfered with the relationship between the O'Connell Company and George R. Jewell, its majority shareholder. She theorizes that by denying the long-term loan, the Bank prevented the corporation from paying its indebtedness to the Jewells forcing the latter to liquidate the corporation. The trial court, as noted, correctly determined that Mrs. Kruse could not seek recovery of damages for any injury to the corporation by reason of her lack of standing to do so. (*Sutter v. General Petroleum Corp., supra*, 28 Cal.2d 525,) The claim lacks merit.

C.

Emotional Distress

The jury awarded Mrs. Kruse $100,000 in damages for intentional infliction of emotional distress. Yet, the precise legal basis supporting the claim eludes comprehension. Mrs. Kruse argues ~~in her brief~~ that the Bank's liability arises from its deliberate conduct ~~in "defrauding a widowed lady of all of her property, including her homes and her livelihood, and~~ with the knowledge she lived on property owned by the O'Connell Company whose bankruptcy would subject~~ing~~ her to the threat of being evicted and homeless." But the ~~legal contours of~~ nature of the bank's misconduct upon which the admittedly sympathetic plaint ~~nowhere appear~~ is grounded remains unclear.

Insofar as the claim for emotional distress is based on the same conduct alleged to show fraud, no recovery is permitted. Emotional distress is not recoverable as an element of damages for

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[18] ~~Mrs. Kruse seems to suggest a three-party arrangement by virtue of the fact that the Bank tried to redirect the Jewells' apples to the Co-op. In this respect, Mrs. Kruse seems to argue that the Bank interfered with the prospective apple supply contracts between the Jewells and the O'Connell Company. If so, there is no causal connection between the tortious activity and the damages since the attempted diversion of apples did not cause the financial collapse of the O'Connell Company.~~

fraud. (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 315; *O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 159.)

~~Most likely, the claim is directed to the conduct of Bunch in seeking to liquidate the O'Connell properties.[19]~~

~~The Bank persuasively argues, however, that its conduct was privileged.~~

Insofar as the claim is directed to the Bank's efforts to liquidate the O'Connell properties, the conduct was privileged. A party is not subject to liability for infliction of emotional distress when it has merely pursued its own economic interests and properly asserted its legal rights. (See *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 395; see also Rest.2d Torts, § 46, com. g, p. 76.)

Here, the Bank's interest in liquidating the O'Connell properties was an act of economic self-interest. The trust deeds on the O'Connell properties had been assigned to the Bank by the Jewells. Without liquidating the O'Connell properties, the Jewells would have been unable to repay the debts owed by them to the Bank.

Of course, the Bank's actions in its own interest are circumscribed in scope and may not be undertaken in an impermissible manner. (See *Fletcher v. Western National Life Ins. Co., supra*, 10 Cal.App.3d 376.) But there is no cognizable showing that the Bank acted in an ~~improper~~ illegal or impermissible fashion. There were no threats or words of abuse directed toward the plaintiff. (Cf. Sanchez-Corea v. Bank of America (1985) 38 Cal.3d 892, 908-909 [public ridicule and use of profanities]; *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493 [racial insult and wrongful discharge]; *Golden v. Dungan* (1971) 20 Cal.App.3d 295 [midnight visits by process server]; *Bundren v. Superior Court* (1983) 145 Cal.App.3d 784 [demands for payment while plaintiff lay in

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[19] ~~Specifically, Bunch demanded in November 1980 that George M. Jewell, as majority shareholder, liquidate the O'Connell properties in order to repay the Bank. When George M. Jewell refused, Bunch met with Dan O'Connell to discuss arrangements for the sale of the O'Connell homes and properties.~~

hospital bed].) In fact, Mrs. Kruse had no ~~relationship~~ contact with the Bank and its officials, directly or otherwise. The Bank's "conduct" consisted of statements by Bunch made to *others*: ~~1)~~ to George M. Jewell urging liquidation proceedings~~; 2)~~ and to Dan O'Connell and his sister pointing out the need to sell the O'Connell properties.[19] ~~Because Dan O'Connell's sister was a licensed real estate broker, the question arose whether she should act as broker in the liquidation sale prompting Bunch to blatantly question her "guts" to sell her mother's house.~~ While Bunch's heartless and insensitive remarks ~~may~~ merit opprobrium, they do not qualify as the kind of "outrageous" conduct necessary to support an action for intentional infliction of emotional distress.[20] (See, e.g., *Davidson v. City of Westminister* (1982) 32 Cal.3d 197; *Cortez v. Macias* (1980) 110 Cal.App.3d 640.)

In summary, we conclude that Mr. Kruse has failed to establish by substantial evidence that the Bank was in any ~~way~~ manner legally ~~answerable~~ responsible for her tragic plight. Accordingly, the judgment in her favor based upon a verdict of fraud, interference with economic advantage or infliction of emotional distress must be reversed.

In view of our dispositive determinations in the matters before us, we need not discuss the remaining issues raised on appeal.

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[19] When a question arose whether Dan O'Connell's sister, a licensed real estate broker, should act as broker in the liquidation sale, Bunch bluntly questioned her "guts" to sell her mother's house.

[20] Testimony that Bank officials knew as early as 1974 that an execution sale of her home would be "upsetting" possessed little relevance as to whether the now challenged conduct was outrageous in legal contemplation. Perhaps all that can be said is that the axis of the financial world turns more on economic reality than human compassion.

The judgments, and each of them, are reversed. The cross-appeals are dismissed as moot. Costs are awarded to the Bank.

CERTIFIED FOR PUBLICATION:

_____

Racanelli, P.J.

We concur:

_____

Elkington, J.

_____

Newsom, J.

APPENDIX B

In the Court of Appeal of the State of California
First Appellate District
Division One

AO 33064, AO 39161
(Sonoma County Super.
Ct. No. 112439)

Irene O'Connell Kruse,
Plaintiff and Appellant,

v.

Bank of America,
Defendant, Cross-Defendant and Appellant;

Charles Duck, as Trustee, etc., et al.,
Cross-Complaintants and Appellants.

[Filed June 17, 1988]

The requests for disqualification of the named justices and of the panel, as contained in plaintiff and appellant Irene O'Connell Kruse's Request That the Justices of Division One Grant Rehearing and Disqualify and Recuse Themselves, and in cross-complainants and appellants Charles Duck's and George R. Jewell's Petition for Disqualification Or In the Alternative Petition for Rehearing, have been duly considered as separate and independent motions to disqualify the individual justices therein designated. Said requests, filed during the pendency of the moving parties' petitions for rehearing, present no basis for disqualification, and each and all are denied. (See *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 939-940.)

Dated: June 17, 1988

RACANELLI, P. J.

NEWSOM, J.

ELKINGTON, J.

APPENDIX C

Order Denying Review

After Judgment by the Court of Appeal
S006208
First District, Division One, No. AO33064, AO39161

In The Supreme Court of the State of California

In Bank

[Filed Sept. 1, 1988]

Kruse, Appellant,

v.

Bank of America, Appellant;
Duck Etc., et al., Appellants

Lucas, C.J. and Panelli, J., Did Not Participate.

The requests to take further evidence are DENIED because petitioners have not made a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law.

The petitions for review are DENIED.

MOSK
Acting Chief Justice

APPENDIX D

Civil No. A033064

Court of Appeal of the State of California
First Appellate District
Division One

Irene O'Connell Kruse,
Plaintiff, Respondent, and Cross-Appellant,
George R. Jewell and Charles Duck,
Trustee of the Bankruptcy Court of
George M. Jewell and Laura E. Jewell,
Cross-Complainants, Respondents,
Cross-Appellants, and Appellants,

v.

Bank of America National Trust and
Savings Association,
Defendant, Appellant, Cross-Respondent,
and Respondent.

Appeal from the Judgments of the Superior Court
of the State of California, County of Sonoma

Honorable Laurence K. Sawyer, Judge

Application of Cross-Appellant Irene O'Connell Kruse
For Relief from Trial Court Confidentiality Order,
Or, in the Alternative, for Leave to File Brief
Under Seal; Memorandum of Points
And Authorities; Order

Lukens, Cooper, Perry
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Attorneys for Plaintiff, Respondent
and Cross-Appellant Irene O'Connell Kruse

I, CAROL G. PERRY, hereby declare:

1. I am a member of the firm of Lukens, Cooper, Perry & Drummond, attorneys for respondent and cross-appellant Irene O'Connell Kruse ("Mrs. Kruse").

2. During the trial of this case, Mrs. Kruse sought to introduce evidence of two separate incidents relevant to the credibility of one of the Bank of America's ("the Bank") major witnesses in the case and to the oppressive nature of the fraud which is the subject of the case. The trial court excluded the evidence of both incidents.

3. Subsequent to the conclusion of the trial, the Bank moved the trial court to issue an order deleting certain portions of the reporter's transcript of the proceedings regarding the admissibility of this evidence.

4. On June 13, 1986, the trial court entered an "Order Regarding Confidentiality Of Transcript" ("the Order") in which it denied the Bank's motion and, instead, ordered that certain portions of the reporter's transcript be sealed. The Order further provided that:

> This order does not restrict the content of briefs to be filed by the parties at the appellate level, but no portion of the reporter's transcript described [in the order] shall be attached to briefs or made public without prior approval of the appellate court.

A copy of the Order is attached hereto as Exhibit A.

5. In her cross-appeal, Mrs. Kruse contends that the trial court's exclusion of the evidence in question was erroneous. In order to comply with the Order forbidding the relevant portions of the reporter's transcript from being made public, she addressed this issue in a separate supplement to her opening brief as cross-appellant and she sought to file the supplement under seal with this Court.

6. By this application, Mrs. Kruse seeks an order lifting the confidentiality condition imposed by the trial court or, in the alternative, granting her leave to file the supplemental brief under

seal. Since her supplemental brief was lodged with the Court on April 7, 1987 and served on all parties on that date, any order issued by the Court should be entered *nunc pro tunc* to that date.

7. As set forth in the memorandum of points and authorities below, there is a strong public policy in favor of free public access to court records. Even if this Court, however, determines that this policy should be superceded in this case and that the record should remain sealed, Mrs. Kruse is still entitled to appellate review of the underlying decision of the trial court to exclude the evidence which is the subject of the Order. She respectfully requests therefore that she be permitted to file her brief on this issue under seal.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of April, 1987 at San Francisco, California.

CAROL G. PERRY

MEMORANDUM OF POINTS AND AUTHORITIES

Except in certain narrowly defined circumstances which are not relevant to this case, the sittings of every court are to be public. Code of Civil Procedure section 124. Publicity of court proceedings is a highly regarded common law practice, the chief purposes of which are: 1) to deter witnesses from testifying falsely; 2) to obtain disclosure of other evidence from spectators; 3) to improve the conduct of judge, jury and counsel by subjecting them to public observation; 4) to allow third persons to determine the effect of litigation upon their own interests; and 5) to educate people generally on the operation of the judicial system. *Cembrook v. Sterling Drug, Inc.* (1964) 231 C.A.2d 52, 59.

Just as court proceedings are to be public, so are the records of those proceedings public. To prevent secrecy in public affairs, public policy makes public records and documents available for public inspection by newsmen and members of the general public alike. *Estate of Hearst* (1977) 67 C.A.3d 777, 782. A court does

have a very limited right to prevent public access to its records. Such a restraint, however, is justified only in certain very narrowly defined situations. The circumstances under which a countervailing policy may come into play generally involve considerations of individual security, personal liberty, private property, or injury to the public or the public good. Even where such considerations exist, restrictions on public access should be temporary. *Craemer v. Superior Court* (1968) 265 C.A.2d 216, 222.

In this case, there are no circumstances which outweigh the policy in favor of free access to the record of the proceedings in the trial court. There is no reason why the review by this Court of the trial court's actions should take place in secret. The confidentiality order should therefore be lifted.

Should this Court decide that the Order should remain in effect for some additional period of time, Mrs. Kruse respectfully requests that an order be issued specifically permitting her to file her supplemental brief under seal. As cross-appellant, she has the right to present to this Court a full and complete argument with appropriate citations to the record as to why the trial court's exclusion of the evidence in question constituted prejudicial error. The only way that she can do so within the restrictions of the Order is to file her brief under seal.

The supplemental brief was lodged with the Court and served on all parties on April 7, 1987. Mrs. Kruse therefore requests that the order of this Court be issued *nunc pro tunc* so that the brief, whether or not filed under seal, will be deemed to have been filed on that date.

Dated: April 30, 1987

CAROL G. PERRY

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Attorneys for Plaintiff
Irene O'Connell Kruse

In the Superior Court of the State of California
In and for the County of Sonoma

No. 112439

Irene O'Connell Kruse,
Plaintiff,

vs.

George M. Jewell, et al.,
Defendants.

And Related Cross-Actions

Order Regarding Confidentiality of Transcript

[Filed June 13, 1986]

The request of defendant and cross-defendant Bank of America N T & S A for deletion of certain portions of the reporter's transcript on appeal came on regularly for hearing on June 5, 1986, before the above-entitled Court in Department 8, the Honorable Laurence K. Sawyer, Judge, presiding; Jeffrey H. Lowenthal of Leland, Parachini, Steinberg, Flinn, Matzger & Melnick appeared on behalf of Bank of America, William M. Lukens of Lukens, St. Peter & Cooper appeared on behalf of plaintiff Irene O'Connell Kruse, and Frances E. Komoroske

appeared on behalf of Charles Duck and George R. Jewell; and the parties having stipulated to an order for corrections of the reporter's transcript, which is filed as a separate document,

IT IS HEREBY FURTHER ORDERED as follows:

1. That the following portions of the reporter's transcript which pertain to the proceedings in chambers regarding the request of counsel for Bank of America to withdraw pursuant to Rule 2-111 of the Rules of Professional Conduct, and the pleadings pertaining thereto, as well as the transcript of the hearing to correct the reporter's transcript held on June 5, 1986, are ordered to be placed in a sealed envelope and delivered to the Court of Appeal:

Date	Volume	Pages
May 16, 1985	X	2229 to 2240
May 21, 1985	XII	2404 to 2419, 2551A to 2595
May 22, 1985	XIII	2677A to 2678
May 22, 1985	XIV	2758 to 2770 (first sequence)

2. The request of defendant Bank of America to delete the above portions of the reporter's transcript is denied.

3. The confidentiality order issued during the trial shall be continued until further order of this Court.

4. This order does not restrict the content of briefs to be filed by the parties at the appellate level, but no portion of the reporter's transcript described above shall be attached to briefs or made public without prior approval of the appellate court.

5. This order is without prejudice to any party's right to seek further orders from the Court of Appeal.

Dated: June 13, 1986

Laurence K. Sawyer
Judge of the Superior Court

ORDER

IT IS HEREBY ORDERED that the provisions of the Order Regarding Confidentiality Of Transcript entered by the Sonoma County Superior Court on or about June 13, 1986 which provisions placed certain portions of the reporter's transcript under seal and restricted the parties from referring to said sections in their briefs and from making them public are hereby dissolved.

IT IS FURTHER ORDERED that the sealed supplement to the opening brief of cross-appellant Irene O'Connel Kruse lodged with this Court on April 7, 1987 shall be filed by the Clerk of this Court and that the filing date shall be deemed to be April 7, 1987.

Dated:

Presiding Judge

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and am not a party to the within cause; my business address is Lukens, Cooper, Perry & Drummond, One Maritime Plaza, Suite 1200, San Francisco, California.

On April 30, 1987, I deposited in the mail at San Francisco, California, a copy of the attached application of Cross-Appellant Irene O'Connell Kruse For Relief From Trial Court Confidentiality Order, Or in the Alternative, or Leave to File Brief Under Seal; Memorandum of Points and Authorities; Order in a sealed envelope, with postage fully prepaid, addressed as follows:

David B. Flinn, Esq.
Steven B. Mains, Esq.
Jeffrey Lowenthal, Esq.
Leland, Parachini, Steinberg, Flinn,
Matzger & Melnick
333 Market Street, 27th Floor
San Francisco, CA 94105

Warren Christopher, Esq.
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400 South Hope Street
Los Angeles, CA 90071-2899

A. Barry Cappello, Esq.
Thomas G. Foley, Jr., Esq.
Frances E. Komoroske, Esq.
Cappello & Foley
831 State Street
Santa Barbara, CA 93101

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 30, 1987 at San Francisco, California.

Raynetta M. Pettaway

Court of Appeal of the State of California
in and for the
First Appellate District
Division One
No. A033064
Sonoma Co. Superior Court 112439

Irene O'Connell Kruse,
Plaintiff, Respondent and Cross-Appellant,
George R. Jewell, et al.,
Cross-Complainants, Respondents,
Cross-Appellants and Appellants,

v.

Bank of America National Trust and
Savings Association,
Defendant, Appellant, Cross-Respondent
and Respondent.

[Filed July 3, 1987]

BY THE COURT:

The application of cross-appellant Irene O'Connell Kruse for relief from trial court confidentiality order, or in the alternative, for leave to file brief under seal, is denied.

Dated July 3, 1987

Elkington, J., Acting P.J.

APPENDIX E

FORM 721

STATEMENT OF ECONOMIC INTERESTS

FILED MAY 10, 1982

NAME: William A. Newsom

MAILING ADDRESS: P.O. 160 Dutch Flat

OFFICE HELD OR SOUGHT:

Associate Justice, Ct/Appeal

STATE OF CALIFORNIA

ANNUAL STATEMENT

PERIOD COVERED: Disclose all reportable interests held or received during the period from January 1, 1981, through December 31, 1981.

SCHEDULE 721-A

INVESTMENTS

SQUAW VALLEY IMPVT. CO.

Common Stock 36 shares

INVEST (Family Co.)

DATE ACQUIRED: 1981

VALUE EXCEEDS: $10,000 but does not exceed $100,000

APPENDIX F

FORM 721

STATEMENT OF ECONOMIC INTERESTS

FILED FEBRUARY 28, 1983

NAME: William A. Newsom

OFFICE HELD OR SOUGHT (E.G. COUNTY SUPERVISOR, CITY COUNCIL MEMBER, ETC.)

Associate Justice, Ct. Appeals

MAILING ADDRESS: 350 McAllister St., S.F. CA 94102

TELEPHONE NUMBER: 415-557-1915

STATE OF CALIFORNIA

ANNUAL STATEMENT

PERIOD COVERED: Disclose all reportable interests held or received during the period from January 1, 1983 [sic] through December 31, 1983 [sic].

VERIFICATION

I declare under penalty of perjury that I have used all reasonable diligence in

preparing this Statement, that I have reviewed the attached schedules and to the best of my knowledge the information provided in this Statement is true and correct.

Executed on Feb. 28, 1983, at San Francisco.

Signature _____

SCHEDULE C-2

INVESTMENTS

NAME OF BUSINESS ENTITY:

Dutch Flat Antiquarian Books

NATURE OF INVESTMENT, E.G. COMMON STOCK, PARTNERSHIP INTEREST, ETC.:

Owner

GENERAL DESCRIPTION OF BUSINESS ACTIVITY: Rare Books, Acquired 1982

VALUE: $1,001 - $10,000

FORM 721

STATEMENT OF ECONOMIC INTERESTS

FILED FEB. 24, 1984

NAME: William A. Newsom

OFFICE HELD OR SOUGHT (E.G. COUNTY SUPERVISOR, CITY COUNCIL MEMBER, ETC.)

Associate Justice, California Ct. of Appeals

MAILING ADDRESS: 2250 Vallejo St., S.F., CA 94123

TELEPHONE NUMBER: 415-931-6287

STATE OF CALIFORNIA

ANNUAL STATEMENT

PERIOD COVERED: Disclose all reportable interests held or received during the period from January 1, 1983, through December 31, 1983.

VERIFICATION

I declare under penalty of perjury that I have used all reasonable

diligence in preparing this Statement, that I have reviewed the attached schedules and to the best of my knowledge the information provided in this Statement is true and correct.

Executed on February 20, 1984, at Dutch Flat, California.

SIGNATURE: /s/ William A. Newsom

SCHEDULE A - INVESTMENTS

NAME OF BUSINESS ENTITY:

Gold Standard

NATURE OF INTERESTS, E.G. COMMON STOCK, PARTNERSHIP INTEREST:

Common Stock

GENERAL DESCRIPTION OF BUSINESS ACTIVITY: Gold Mines

ACQUIRED: 1983

VALUE: $1,001 - $10,000

OWNERSHIP INTEREST: Less than 10%

NAME OF BUSINESS ENTITY:

Brennan J. Newsom

NATURE OF INTERESTS, E.G. COMMON STOCK, PARTNERSHIP INTEREST:

Partnership in Ownership of Common Stock

GENERAL DESCRIPTION OF BUSINESS ACTIVITY: Stock Purchase

ACQUIRED: 1983

DISPOSED: 1983

VALUE: $1,001 - $10,000

OWNERSHIP INTEREST: Less than 10%

NAME OF BUSINESS ENTITY:

Nicasio Partnership

NATURE OF INTERESTS, E.G. COMMON STOCK, PARTNERSHIP INTEREST:

Holds note and trust deed on real property

GENERAL DESCRIPTION OF BUSINESS ACTIVITY: Passive Investment

ACQUIRED: 1979

VALUE: $1,001 - $10,000

$10,001 - $100,000

OWNERSHIP INTEREST: Less than 10%

OFFICE OF THE CLERK

Court of Appeal

State of California

FIRST APPELLATE DISTRICT

April 13, 1984

Alice Hughes
The Fair Political Practices
Commission
Technical Assistant and
Analysis Division
P.O. Box 807
Sacramento, California 95804

Re: William A. Newsom

Dear Ms. Hughes:

We are forwarding herewith for filing the amended schedules with

verification for the Honorable William A. Newsom which we discussed on the telephone earlier this week. You may recall, I made inquiry as to what procedure the judge should follow as he inadvertently failed to include two items on his form 721. If there are any questions, please call the undersigned on ATSS 597-1929.

Very truly yours,

/s/ Clifford C. Porter

Clifford C. Porter
Clerk of the Court

SCHEDULE C-2

INVESTMENTS

NONE DISCLOSED.

NAME: William A. Newsom

FILED APR. 11, 1984

VERIFICATION OF AMENDMENT

I declare under penalty of perjury that I have used all reasonable diligence in preparing this Statement, that I have reviewed the attached schedules and to the best of my knowledge the information provided in this Statement is true and correct.

Executed on April 11, 1984, at S.F. Calif.

SIGNATURE: /s/ W. A. Newsom

FORM 721

STATEMENT OF ECONOMIC INTERESTS

FILED MARCH 1, 1988

NAME: William A. Newsom

MAILING ADDRESS: Court of Appeal,
350 McAllister St., San Francisco,
CA 94102

OFFICE SOUGHT OR HELD:

State of California Office:

Court of Appeal, Judge

Judicial Branch

ANNUAL STATEMENT

PERIOD COVERED: Disclose all reportable interests held or received during the period from January 1, 1987 through December 31, 1987.

SCHEDULE E -- LOANS

NAME: Bank of America

ADDRESS: High Street, Auburn, CA

(Customline Credit)

OVER $10,000

REPAID: No.

SPECIFIC SECURITY FOR LOAN INCLUDING GUARANTOR: None

INTEREST RATE: 18%

APPENDIX G

STATE OF CALIFORNIA

STATEMENT BY DOMESTIC STOCK CORPORATION

THIS STATEMENT MUST BE FILED WITH

THE CALIFORNIA SECRETARY OF STATE

(SEC. 1502 CORPORATIONS CODE)

FILED JUNE 25, 1982

3994440 Due Date 07-31-82 23076S

*

SQUAW VALLEY IMPROVEMENT CORPORATION

WILLIAM A. NEWSOM JR

350 McALLISTER ST

SAN FRANCISCO, CA 94102

THE CORPORATION NAMED HEREIN, ORGANIZED UNDER THE LAWS OF THE STATE OF CALIFORNIA, MAKES THE FOLLOWING STATEMENT:

Street Address of Principal Executive Office:

c/o Leland, Parachini, Steinberg, Flinn, Matzger & Melnick
333 Market Street, Ste. 2700
San Francisco, CA 94105

Mailing Address (Optional):

c/o Leland, Parachini, Steinberg, Flinn, Matzger & Melnick
333 Market Street, Ste. 2700
San Francisco, CA 94105

NAMES OF THE FOLLOWING OFFICERS ARE:

Barbara Newsom
Chief Executive Officer
333 Market Street, Ste. 2700
San Francisco, CA 94105

Sharon C. Mohun
Secretary
333 Market Street, Ste. 2700
San Francisco, CA 94105

Sharon C. Mohun
Chief Financial Officer
333 Market Street, Ste. 2700
San Francisco, CA 94105

NAMES AND COMPLETE BUSINESS OR RESIDENCE ADDRESS OF INCUMBENT DIRECTORS INCLUDING THOSE DIRECTORS WHO ARE ALSO OFFICERS. (Attach a supplemental list of directors if needed).

Barbara Newsom
333 Market Street, Ste. 2700
San Francisco, CA 94105

Sharon C. Mohun
333 Market Street, Ste. 2700
San Francisco, CA 94105

Patrick Newsom
333 Market Street, Ste. 2700
San Francisco, CA 94105

THE NUMBER OF VACANCIES ON THE BOARD, IF ANY:

None

AGENT FOR SERVICE OF PROCESS:

David B. Flinn

333 Market Street, Suite 2700

San Francisco, CA 94105

TYPE OF BUSINESS

Explanation must be brief:

Real Estate Investment

I DECLARE THAT I HAVE EXAMINED THIS STATEMENT AND TO THE BEST OF MY

KNOWLEDGE AND BELIEF, IT IS TRUE, CORRECT AND COMPLETE.

6/18/82	Ass't Secretary	David B. Flinn
Date	Title	

/s/ David B. Flinn
Signature of Corporate Officer or Agent

APPENDIX H

DECLARATION OF LUCILLE SANCHEZ-COREA

LUCILLE SANCHEZ-COREA, under penalty of perjury, declares as follows:

1. I was one of the plaintiffs in the case of Sanchez-Corea, et al. v. Bank of America (1985) 38 Cal.3d 892, in which the plaintiffs were awarded damages in the amount of $2,000,000, $1,000,000 in compensatory damages and $1,000,000 in punitive damages, against defendant Bank of America for fraud, breach of contract and other tortious conduct arising out of our banking relationship. The trial decision was appealed and assigned to Division One of the First Appellate District in San Francisco. Ultimately, the case was decided by the Supreme Court.

2. Oral argument before Division One occurred on December 28, 1982,

before Justices Holmdahl, Racanelli and Newsom. Sometime after the oral argument, Justice Holmdahl disqualified himself because of a conflict of interest. Ultimately, Justice Daniel Weinstein was assigned to Justice Holmdahl's position and the matter was re-heard before Justices Weinstein, Racanelli and Newsom on June 29, 1983.

3. I attended both hearings on oral argument before Division One on December 28, 1982 and June 29, 1983. I have no recollection of Justice Racanelli volunteering or disclosing that he owned a Visa card or other disqualifying facts at either of these hearings.

4. The foregoing information is within my personal knowledge, and if called upon as a witness I could competently testify thereto.

Executed this 14th day of July, 1988, at San Francisco, California.

/s/ Lucille Sanchez-Corea

LUCILLE SANCHEZ-COREA

APPENDIX I

1ST DOCUMENT of Level 1
printed in FULL format

*** THIS DATA IS FOR INFORMATION PURPOSES ONLY. CERTIFICATION CAN ONLY BE OBTAINED THROUGH THE OFFICE OF THE CALIFORNIA SECRETARY OF STATE. ***

CALIFORNIA SECRETARY OF STATE,

CORPORATE RECORD

NAME: Squaw Valley Improvement Corporation

TYPE OF CORPORATION: Articles of Incorporation (Domestic)

CORPORATE STATUS: Dissolved

DATE OF INCORPORATION/QUALIFICATION: 07/13/1960

MAILING ADDRESS:

c/o Leland Parachini Steinberg
Flinn Matzger Melni [sic]
333 Market St #2700
San Francisco, CA 94105

REGISTERED AGENT: David B. Flinn

REGISTERED OFFICE:

333 Market St Ste 2700

San Francisco, CA 94105

PRESIDENT: Barbara Newsom

333 Market St Ste. 2700

San Francisco, CA 94105

STATEMENT OF OFFICERS FILE NUMBER:

220126

STATEMENT OF OFFICERS FILE DATE:

06/25/82

TAX BASIS: Stock

CORPORATION NUMBER: 399444

HISTORY:

DATE: 09/24/1980

TRANSACTION: Secretary of State

Delinquency Letter

DATE: 12/01/1980

TRANSACTION: Secretary of State

De-Certification

DATE: 05/09/1983

TRANSACTION: Certificate of Dissolution

DATE OF LAST MDC TRANSACTION:

02/08/1988

APPENDIX J

Lukens, St. Peter & Cooper
William M. Lukens
Alcoa Building, Suite 250
One Maritime Plaza
San Francisco, CA 94111
Telephone (415) 433-2261

Frederick E. Watson
A Professional Corporation
Frederick E. Watson
Glenn H. Wechsler
1990 N. California Blvd., Suite 630
Walnut Creek, California 94596
Telephone: (415) 947-0393
Attorneys for Plaintiff

In the Superior Court of the State of California
In and for the County of Sonoma

No. 112439

Irene O'Connell Kruse,
Plaintiff,

vs.

The Bank of America National Trust and Savings Association,
A National Banking Institution,
Defendant.

And Related Cross-Actions

Third Amended Complaint for Fraud, Intentional Infliction of Emotional Distress, and Intentional Interference With Prospective Economic Advantage.

[Filed July 16, 1985]

Plaintiff Irene O'Connell Kruse hereby complains of defendant the Bank of America National Trust and Savings Association, a National Banking Institution, as follows:

First Cause of Action for Fraud, By Plaintiff Irene O'Connell Kruse Against Defendant Bank of America:

1. At all times herein mentioned, defendant Bank of America National Trust and Savings Association ("Bank") was and is a corporation and a federally chartered national bank, engaged in the banking business. At all times herein mentioned, Raymond Timmerman ("Timmerman") was a Vice President of the Bank and head of the Regional Credit Office having jurisdiction over the Sebastopol branch. At all times herein mentioned up until September 30, 1979, William Sullivan ("Sullivan") was a Vice President of the Bank and Manager of the Sebastopol branch. At all times herein mentioned from December 23, 1979, onward, Roger Bunch ("Bunch"), was a Vice President of the Bank and Manager of the Sebastopol branch.

2. At all times herein mentioned, the James E. O'Connell Company, Inc. ("O'Connell Company"), was and is a corporation duly organized and existing under the laws of the state of California, which corporation owned and owns 72 acres of land located near the City of Sebastopol, Sonoma County, California, of which 57 acres were and are prime apple orchards. Two family residences were owned by the corporation and located on the said acreage in one of which the plaintiff and her husband resided and in the second of which resided their adult son, Daniel O'Connell.

3. All of the stock of the O'Connell Company was owned by its founder, James E. O'Connell, up until the time of his death in December 1971, following which, his widow, Irene O'Connell, the plaintiff herein, inherited all of the said stock.

4. The O'Connell Company was, at all times herein mentioned, up until 1981, engaged in the business of growing apples in its own orchards and operating a dehydrating plant in which it dried its own apples and additional apples purchased from other apple growers, and thereafter sold the dried apple products.

5. Following the death of his father in December 1971, Daniel O'Connell took over operation of the O'Connell Company and gradually built up the business until, in the year 1973, a net profit of $62,000 was made and the company was being operated soundly and profitably.

6. At all times herein mentioned up until 1983, the Sebastopol Cooperative Cannery ("Co-op") was a California corporation, operating as an apple growers co-operative near Sebastopol, and was in the business of processing and dehydrating apples which it received from the apple growers who were the members of the Co-op, and the Co-op was a business competitor of the O'Connell Company.

7. As of 1973, both the O'Connell Company and the Co-op had been banking customers of the Sebastopol branch of the bank, for over 20 years.

8. In the fall of 1973, the Regional Water Quality Control Board, with jurisdiction over the region that included Sebastopol, issued cease and desist orders to the O'Connell Company and the Co-op, requiring that each of those companies make expensive capital improvements to their waste water treatment facilities, within a specified time, or shut down their operations.

9. In 1974, the Co-op signed an agreement with a public agency to have issued $500,000 in bonds for construction of the required new waste water treatment facilities, and the bank underwrote the bond issue, with the first repayment of the loan due to be made July 1, 1975.

10. In May 1974, the Bank considered the O'Connell Company, under the management of Daniel O'Connell, to be a well-run, profitably operated company. The Bank realized and knew that the company needed a long term real estate loan to provide needed additional working capital, which had been depleted by use of working capital to construct the required waste water treatment facilities. The Bank considered the O'Connell Company to be creditworthy for such a long term real estate loan, and the Bank believed that there was no reason why the O'Connell Company would not be continued to be operated profitably in the future, under the management of Dan O'Connell, if the Bank gave the needed long term real estate loan, and continued to give the company its annual operating line of credit.

11. However, in May 1974, the Bank also knew that the Co-op had made the decision to build a new dehydration plant, with greatly increased capacity, and the Bank knew that it had already

underwritten the $500,000 in bonds for construction of the new waste water treatment facilities of the Co-op. Further, the Bank knew in May 1974 that the Bank intended to finance the construction of the Co-op's new plant, and that the supply of apples from the grower-members of the Co-op was insufficient to permit the contemplated larger plant to operate with economic efficiency, unless the Co-op could purchase each year, an additional amount of 15,000 tons of local apples, from non-member sources. The Bank further knew in May 1974 that so long as the O'Connell Company was in business and in competition with the Co-op, the Co-op would not be able to purchase the required additional local tonnage of apples for processing in the dehydrater. The Bank thus knew that the Co-op would not be able to operate with economic efficiency, and would not be able to repay the contemplated construction loan to be made to the Co-op by the Bank, unless the O'Connell Company went out of business or was put out of business. Therefore, the Bank, acting through Timmerman and Sullivan, decided in May 1974, to extend short term credit to the O'Connell Company, and later obtained security, for that short term credit, in the form of warehouse receipts for inventory to be produced by the O'Connell Company in the 1974 season, beginning in August 1974. The Bank further decided and planned that after it had so obtained security for the short term credit, the Bank would then cut off all credit to the company. The bank intended to do this in such manner that the O'Connell Company would not be able to pay its creditors, other than the Bank, and would be forced into bankruptcy and put out of business, so that the O'Connell Company would no longer be in competition with the Co-op.

12. In May 1974, the O'Connell Company applied for a long term real estate loan, but the Bank, pursuant to its plan and intention, refused to give the same, and instead forced the O'Connell Company to complete the financing of its new capital improvements for waste water improvement, and to finance its day to day operations, all out of operating income, plus overdraft financing supplied by the Bank, which overdraft financing reached an amount as high as $240,000, but which overdraft was completely paid off by January 29, 1975.

13. The Bank, acting through Sullivan and Timmerman, concealed from the O'Connell Company, the fact that the Bank intended to take all of the dried products from the 1974 season (August 1974 through January 1975) as collateral security, by means of having the dried product placed in a warehouse under warehouse receipts which could be assigned and pledged to the Bank, and then, after doing this, that the Bank would cut off all financing and credit to the company.

14. In February 1975, the Bank acting through Sullivan and a trust officer of the trust department of the Bank, caused and forced a creditor of the O'Connell Company, the Taylor-Doyle Company, to institute a lawsuit against the O'Connell Company, to recover the amounts due for apples sold to the O'Connell Company. The O'Connell Company let the suit go by default, believing that the Bank would give to the O'Connell Company, in May 1975, the annual operating line of credit which the Bank had given to the O'Connell Company each year for many years previously. The Bank concealed from the O'Connell Company and plaintiff that it had instigated the said lawsuit.

15. In May 1975, the Bank cut off all credit to the O'Connell Company, but thereafter the Bank made statements and representations to Dan O'Connell and the O'Connell Company which the Bank intended to, and did, lead Dan O'Connell and the O'Connell Company into believing that if the O'Connell Company would use all of its available income to continue to make payments to reduce the debt owed to the Bank, that the Bank would relent and give the long term real estate loan financing to the O'Connell Company, which it required to remain in business. Accordingly, the O'Connell Company and Dan O'Connell, so believing this, did use all of the available operating income of the company, to reduce indebtedness to the Bank and the O'Connell Company paid $78,000 to reduce indebtedness to the Bank, during the summer and fall of 1975, and therefore, because of using all available monies to pay down loans from the Bank, the company was not able to pay off the judgment held by the Taylor-Doyle Company, in the amount of $98,000.

16. In January 1976, a Sheriff's execution sale was scheduled to sell all of the O'Connell Company's property and assets, and

this sale was avoided at the last minute, only because George M. Jewell ("Jewell") borrowed $150,000 from the Bank and loaned that amount to the O'Connell Company, to pay off the Taylor-Doyle judgment which in turn enabled the Taylor-Doyle Company to pay off its indebtedness to a trust, of which the Bank was trustee. Jewell then became active in management of the O'Connell Company.

17. In December 1977, Jewell requested, but the Bank refused to give, a construction loan to the O'Connell Company, for construction of a new dehydration plant, and the Bank so refused because the Bank did not wish to finance construction of a new plant to compete with the Co-op's new plant, that the Bank was already financing. Jewell and the O'Connell Company then obtained a construction loan from another lender, a competitor of the Bank, and began construction of the O'Connell Company's new plant. The Bank learned of this and the Bank decided to get back into financing the O'Connell Company's new plant, in order for the Bank to be able to control the situation, and liquidate the O'Connell Company, to eliminate the competition for the Co-op.

18. Therefore, in late 1978, the Bank through Sullivan, represented to plaintiff that if, but only if, she would sell and transfer the controlling stock interest in the O'Connell Company to Jewell, then the Bank intended to, and would, provide the balance of construction financing required, and would then give the long term loan and financing, for the O'Connell Company's new dehydration plant, that was then under construction.

19. The said representation was false and misleading without qualification, and was known to the Bank to be so false and misleading, in that the Bank knew that it did not intend to give long term financing to the O'Connell Company, for the new plant, but rather intended to give short term loans to Jewell, who would in turn relean the money to the O'Connell Company on a short term basis, and the Bank knew that the O'Connell Company could not repay to Jewell, when due, the short term loans. The Bank further knew that it intended to obtain as security for the short term loans it was making, all of the assets of the O'Connell Company, by means of Jewell having the controlling stock interest, so that he could liquidate the O'Connell Company to pay

short term debt owed by the O'Connell Company to himself ("Jewell"), so that Jewell could repay his short term debt to the Bank. The Bank further knew that after obtaining such security, the Bank intended to refuse to give the long term financing, and to then force Jewell to exercise his control over the O'Connell Company (i.e. his majority shareholder control), to liquidate the O'Connell Company and to put it out of business and thus eliminate the O'Connell Company as a competitor of the Co-op, so that the Co-op could repay its indebtedness to the Bank.

20. The Bank further knew that the said representation of intention was misleading, because [it was] not qualified by disclosure of the material facts of the Bank's fraudulent, malicious and injurious conduct towards the O'Connell Company, in 1974-1975, when the Bank had obtained security and then cut off all credit.

21. The Bank intended to deceive plaintiff and induce plaintiff to transfer and sell a controlling stock interest in the O'Connell Company, to Jewell, in reliance upon the said false representation, and without knowledge of the said fraudulent and injurious conduct of the Bank towards the O'Connell Company in 1974-75.

22. Plaintiff justifiably relied upon the said false and misleading representation and believed it to be true, and transferred and sold fifty-one percent (51%) of the stock of the O'Connell Company to Jewell, on or about January 8, 1979, for $180. Plaintiff would not have so acted had she known the falsity of the said representation or had she known the material facts not disclosed, which qualified the representation made and made it misleading without disclosure of such material facts. Had plaintiff not so relied and transferred the controlling stock interest to Jewell, and relied upon the Bank for financing, the O'Connell Company would have obtained long term financing elsewhere, and the O'Connell Company would have gone forward profitably.

23. After completion of construction of the O'Connell Company's new dehydration plant, in June 1979, the Bank, acting through Timmerman, refused, in August 1979, to extend a long term real estate loan to the O'Connell Company, and the Bank later insisted in April 1980, upon Jewell liquidating the O'Connell

Company as a means of raising money for Jewell, which he could use to pay off his own short term indebtedness to the Bank. The O'Connell Company was forced into bankruptcy as a result.

24. As a direct and proximate result of plaintiff's said reliance upon the said fraudulent representations, plaintiff was damaged in the amount of $2.9 million, consisting in the difference between the value of 51% of the stock of the O'Connell Company, as of January 8, 1979, and $180 received by her in payment therefor, which stock became valueless thereafter, when the company was forced into bankruptcy by the Bank's aforesaid conduct. In addition, plaintiff lost dividends that plaintiff would have been paid by the O'Connell Company, on her stock, had she not been induced by the said fraud, to sell 51% of the stock, and had instead retained it, and she and her son Dan O'Connell, remained in control of the operation of the O'Connell Company, and obtained long term financing from another lender. Such long term financing could and would have been obtained, from another lender, but for the Bank's said fraud.

25. That in the premises, defendant acted with intentional fraud and intent to deprive plaintiff of property rights and to injure plaintiff, financially, and to cause unjust financial hardship to plaintiff, and defendant therefore acted with intentional fraud, and/or malice and oppression, so that plaintiff is entitled to recover from the defendant Bank, punitive damages in the amount of $100 million.

WHEREFORE, etc.

Second Cause of Action by Plaintiff Against Defendant Bank of America for Intentional Infliction of Emotional Distress:

26. Plaintiff incorporates by reference as though fully set forth, and realleges, paragraphs 1-23, inclusive, of the First Cause of Action above.

27. The Bank intended in 1975, to cause severe emotional distress to plaintiff, because of her fear and worry that the O'Connell Company would be bankrupted and residence would be sold, and she would be evicted and financially ruined. In the alternative, the Bank acted with a reckless and conscious disre-

gard of the rights of plaintiff, and a reckless disregard of the probability of causing severe emotional distress to the plaintiff.

28. As a direct and proximate result of the said outrageous conduct of the Bank, in 1974-1975, plaintiff suffered severe emotional distress from May 1975 to and including January 6, 1976, worrying about financial ruin and being evicted from her home, and plaintiff became particularly susceptible to emotional distress and worry about loss of her home and worry about financial ruin. The Bank learned of such severe emotional distress of plaintiff in 1975-1976, and knew of such particular susceptibility of plaintiff to emotional distress from such conduct, when the Bank later, in 1980, engaged in a repetition of such conduct.

29. In 1980, after the Bank had refused to grant the necessary long term financing to the O'Connell Company, the Bank forced Jewell to liquidate the O'Connell Company, and this in turn forced the O'Connell Company into bankruptcy. The Bank intended to cause severe emotional distress to plaintiff from worrying about loss of her home, and from fear of eviction from her home and financial ruin. In the alternative, the Bank acted with a conscious and reckless disregard of the rights of the plaintiff and of the probability of causing such severe emotional distress to her.

30. In so acting in 1979 and in 1980, the Bank acted through Vice President Timmerman, and Vice President Bunch, who was instructed and assigned by Timmerman and other officers of the Bank, to take over as manager of the Sebastopol branch and cause and bring about liquidation of the O'Connell Company to eliminate the company as competition for the Co-op.

31. As a proximate result of the said outrageous conduct by the Bank, plaintiff was caused to and did sustain severe emotional distress and worry, from early 1980 to and including the present time of the conclusion of the trial in this action, to plaintiff's damage in the sum of $500,000.

32. Defendant acted in the premises with the intent to cause severe emotional distress to plaintiff and to impose cruel and unjust hardship upon plaintiff, in conscious disregard of the rights of plaintiff, and the Bank thus acted with malice and oppression,

and plaintiff is entitled to recover $100 million in punitive damages against the Bank.

WHEREFORE, etc.

Third Cause of Action by Plaintiff Against Defendant Bank of America for Intentional Interference with Prospective Economic Advantage:

33. Plaintiff incorporates by reference paragraphs 1 through 23 of the First Cause of Action and paragraph 30 of the Second Cause of Action, and realleges the same as though fully set forth.

34. That after the said stock transfer and sale, there was a relationship of majority and minority shareholder between Jewell and plaintiff respectively, which relationship gave rise to a duty on the part of Jewell, as majority shareholder, not to act unfairly to place his own financial interests ahead of those of plaintiff.

35. This relationship contained the probability of economic benefit to plaintiff in that but for the intentional interference of the Bank, hereinafter alleged, Jewell would have performed his duties as majority shareholder of the O'Connell Company, and would have obtained long term financing for the O'Connell Company of the cost of construction of its new plant, and would have paid off the indebtedness of the O'Connell Company to himself, and returned the 51% controlling stock interest to the plaintiff, for $180, and plaintiff would have been restored to full stock ownership of the O'Connell Company, and would have received economic benefit in the form of dividends representing all of the profits of the O'Connell Company.

36. In the alternative, but for the interference and misconduct of the Bank, Jewell would have obtained from the Bank, a terming out of his short term indebtedness to the Bank, for a period of twenty years or more, and would have exercised his majority shareholder's position in the O'Connell Company, to cause and permit the O'Connell Company to term out its short term indebtedness to Jewell, over the same period of twenty years or more, and Jewell would have caused and permitted payment of dividends to plaintiff, by the O'Connell Company, representing profits after debt service.

37. The Bank had knowledge of the said existing relationship between plaintiff and Jewell of majority and minority shareholders of the O'Connell Company, and the relationship of debtor and creditor between the O'Connell Company and Jewell, and the Bank further had knowledge of the arrangement and agreement for return to plaintiff, of the 51% of the stock sold by plaintiff to Jewell, whenever the O'Connell Company indebtedness to Jewell was retired and paid off. With said knowledge, the Bank acted with the specific intent to disrupt the said relationship between plaintiff and Jewell, by declining and refusing to give reasonable long term real estate financing to the O'Connell Company, and by refusing to give reasonable long term twenty year or more terming out of Jewell's indebtedness to the Bank, and by forcing Jewell to exercise his majority shareholder's control in an improper manner, by liquidating the assets of the O'Connell Company. The Bank acted with the specific intent to disrupt the existing relationship between plaintiff and Jewell. The Bank further acted with the specific motive, purpose and intent, of liquidating and destroying the O'Connell Company, to eliminate it as a competitor for the Co-op, so the Bank could be repaid the debt owed by the Co-op to the Bank, because of the Co-op's being able to operate efficiently without the competition of the O'Connell Company. At the said time, in 1980, the Co-op was indebted to the Bank in excess of $20 million, whereas Jewell was indebted to the Bank only in the approximate amount of $3 million, and the Bank believed it was adequately secured and could receive payment in full of the said $3 million, if all of the assets of the O'Connell Company, and some or all of the assets of the Jewells, were liquidated.

38. As a direct and proximate result of the said wrongful interference by the Bank, Jewell began liquidating of the O'Connell Company, and it was forced into bankruptcy, and the relationship of minority and majority shareholder between plaintiff and Jewell, was disrupted to the extent that Jewell did not perform his duty and obligation as majority shareholder to act fairly and not place his own financial interests ahead of those of plaintiff, and Jewell was not able to, and did not, cause the O'Connell Company to repay its indebtedness to him, so that he could return the 51% controlling stock interest in the company, to the plaintiff.

39. That the Bank's said interference with and disruption of the said relationship between plaintiff and Jewell destroyed the value of plaintiff's stock in the O'Connell Company, and prevented payment of dividends to her by the O'Connell Company, all to plaintiff's damage in the sum of $2.9 million.

40. That in the premises, the Bank acted with the specific intent to cause financial injury to plaintiff and to impose cruel and unjust financial hardship upon plaintiff, and the Bank acted in conscious disregard of the rights of plaintiff, and the Bank thus acted with malice and oppression, and plaintiff is entitled to recover punitive damages against the Bank in the amount of $100 million.

WHEREFORE, plaintiff prays judgment against the defendant Bank as follows:

1. On the first cause of action:

   1.1. Compensatory damages in the amount of $2.9 million.

   1.2. In addition, punitive damages in the amount of $100 million.

2. On the second cause of action:

   2.1. Compensatory damages in the amount of $500,000.

   2.2. In addition, punitive damages in the amount of $100 million.

3. On the third cause of action:

   3.1. Compensatory damages in the amount of $2.9 million.

   3.2. In addition, punitive damages in the amount of $100 million.

4. For costs of suit, and for such other and further relief as may seem proper to the Court.

Dated: July 15, 1985.

Lukens, St. Peter & Cooper
Frederick E. Watson
A Professional Corporation

By: Frederick E. Watson

Attorneys for Plaintiff

APPENDIX K

BIOGRAPHY OF A BANK

The Story of Bank of America N.T. & S.A.

M.J. & B.R. James, Harper & Bros. 1954

p. 46

A section of the [Bank Act, 1909], not much noticed until Giannini began to take advantage of it, had to do with branch banking. Because of the distances in California there had long been a certain amount of branch banking by a few large country banks. Nothing in the laws prior to 1909 authorized or forbade it. The framers of the act of 1909 could hardly have foreseen branch banking as an important issue or they would

not have treated it in the negative way they did.

It was a comparatively simple matter for the Bank of Italy to bring itself within the terms of the new law.

p. 72

Birth of Statewide Branch Banking

Three years of whirlwind activity saw the bank's flag planted from Santa Rosa in the north to Ventura in the south, four hundred miles away. Between those geographical extremes ten other new rural branches were established. Moreover, the bank opened four branches in Oakland, across the bay from San Francisco, one in suburban Redwood City, and an additional branch in Los Angeles. By the end of 1918 only three banks in California topped the

Bank of Italy assets. The first statewide banking system in the United States was an accomplished fact.

p. 74

The 7 largest stockholders were: A.P. Giannini, 1081 shares; Dr. G.E. Caglieri, 700; William A. Newsom, 700 . . . .

p. 268

The Dream of Nationwide Banking

With the victory for statewide banking won in 1927, A.P. Giannini regarded as only half done the task of improving the country's banking system. The other half was to permit branch banks to cross state lines.

APPENDIX L

SAN FRANCISCO CHRONICLE

OCTOBER 19, 1933

NEWSOM, FIRST STATE BRANCH BANKER, DIES

MISSION DISTRICT LEADER LONG ACTIVE IN CIVIC AND BUSINESS LIFE

William A. Newsom, 68, Mission banker, died yesterday, following an illness of several weeks. He was the first manager of a branch bank in California. He established the Twenty-ninth and Mission branch of the Bank of America in 1907, and at the time of death was vice president and chairman of the advisory board.

MANY AFFILIATIONS

During his banking career of 25 years, Mr. Newsom was never too busy to give consideration to any who appealed

to him in distress, and his aid launched many a successful career.

After the fire in 1906, he was placed in charge of relief for the outer Mission district. During the administration of P.H. McCarthy as Mayor, he served as Commissioner of Public Works.

AIDED MANY CAREERS

Mr. Newsom was a director of Mary's Help Hospital, past president of the San Francisco Builders' Association, a member of the Elks, Knights of Columbus and Woodmen of the World.

Deceased was 68 years of age. He is survived by his widow, Mrs. Belinda D. Newsom; three sons, George W., William A. Jr. and A.C. Newsom, and three daughters, Mrs. Richard Reilly, Mrs. Irving Person and Mrs. P.A. Pencola.

APPENDIX M

THE ARK

Tiburon, California

Newspaper

November 2, 1988

The [International Bioethics] institute is a nonprofit organization located in modest offices at 250 Masonic Avenue, but backed by a board of directors composed of successful and influential local leaders.

In addition to President William Atchley, there are justice William A. Newsom of the California Appellate Court, vice president; Leland S. Prussia, former President of the Bank of America, treasurer; Steve Heilig, M.P.H., Staff Associate of the San Francisco Medical Society, secretary.

APPENDIX N

"NEWSFRONT"

BANKAMERICA CORPORATION

June 27, 1988

LOWER COSTS SET FOR CUSTOMLINE CREDIT ACCOUNTS

Bank of America will lower the cost of its CustomLine Credit and CustomLine Preferred accounts, effective July 9.

The CustomLine Credit account provides an unsecured personal line of credit from $3,000 to $10,000 for customers with total annual gross incomes of $40,000 or more.

CustomLine Preferred provides a credit line of up to $50,000 for those with incomes of $70,000 or more.

Together, these two accounts represent more than $1.5 billion in

unsecured lines of credit to Bank of America customers.

Each account carries a variable interest rate that changes monthly based on the published average interest rate for 1-month jumbo certificates of deposit (CD). The previous index used was based on the average rate of 3-month jumbos.

The interest spread over the newly adopted index has been reduced from 7.5 to 6.5 percent for CustomLine Credit and from 5 to 4.25 percent for CustomLine Preferred.

The annual fee also was reduced from $45 to $25 and minimum monthly payments will be lowered. This reduction became effective June 10. On outstanding balances of $3,000 or less, the minimum monthly payment will be $75, down from $200.

The new interest rates will be determined in early July, when the average 1-month jumbo CD rate is received from the Federal Reserve Board.

APPENDIX O

Civil No. A033064/A039161

Court of Appeal of the State of California
First Appellate District
Division One

Irene O'Connell Kruse,
Plaintiff, Respondent, and Cross-Appellant,
George R. Jewell and Charles Duck,
Trustee of the Bankruptcy Court of
George M. Jewell and Laura E. Jewell,
Cross-Complainants, Respondents,
Cross-Appellants, and Appellants,

v.

Bank of America National Trust and
Savings Association
Defendant, Appellant, Cross-Respondent,
and Respondent.

Appeal from the Judgments of the
Superior Court of the State of California
County of Sonoma
Honorable Laurence K. Sawyer, Judge

Memorandum of Points and Authorities in Support of
Plaintiff-Respondent and Cross-Appellant's Request
That the Justices of Division One Grant Rehearing
And Disqualify and Recuse Themselves

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Cross-Appellant Irene O'Connell Kruse

I

INTRODUCTION AND SUMMARY OF ARGUMENT

As shown hereinafter, Justice Racanelli owns stock in the Bank of America (the "Bank"), or has owned same during the time these appeals were pending before this Division and during the time that the Court ruled upon motions which had a significant bearing upon the decision of the appeals, and Justice Newsom has had a long-standing credit relationship with the Bank and, in 1987, solicited and received from the Bank, or was offered by the Bank, and he accepted, a revolving line of credit loan which had no stated maturity, but could be cancelled by the Bank at any time, and therefore the credit continued in effect at the discretion of the Bank.

Justice Racanelli and Justice Newsom declared their disqualification in another case involving the Bank at the time of oral argument of that other appeal in April 1986, and did so on the basis of the said stock ownership and lender/borrower relationship, but Justices Racanelli and Newsom have never offered to disqualify themselves in these present appeals, and did not make disclosure at the time of oral argument on these appeals. In addition, Justice Elkington was the third member of the panel on the other appeal involving the Bank heard in April 1986, but has never disclosed in these appeals the disqualification of Justices Racanelli and Newsom.

Accordingly, for the foregoing reasons, we submit that the decision of the Court is invalid, because a majority of the Court was disqualified, and the Court should grant rehearing for this reason, and the other reasons set forth in the Petitions for Rehearing; and the members of the Court should then recuse and disqualify themselves so that there may be reconsideration and decision of these appeals by another Division of the Court, or another District, as may be appropriate.

Because we recognize that the failure to disclose the disqualification of the members of the Court may have been due to inadvertence or oversight, and since we assume that the Court will be disposed to grant the request for rehearing and disqualification, we see no reason or necessity for making a public record at

this time of the request for rehearing and for recusal. We therefore request that the Court grant an order for filing these pleadings under seal and that the Members of the Court make immediate written disclosure to counsel for all parties of any facts which the Members of the Court feel bear upon possible grounds of disqualification.

Regardless of the manner in which the Court Members elect to handle or respond to the request for grant of rehearing on grounds of disqualification, we respectfully request immediate advice from the Court concerning its decision on the request for grant of rehearing on grounds of disqualification for the following reasons: If the request for rehearing and grounds for disqualification is granted, then counsel for plaintiff-respondent can take appropriate steps to request the Chief Justice to transfer the appeals to another Division of this Court or another District as may be appropriate.

On the other hand, if for reasons presently unknown to us and which we cannot anticipate, the Court should decline to grant rehearing on grounds of disqualification, then we submit that it is critical and essential that we be advised immediately so that we may take all necessary steps to supplement the plaintiff-respondent's Petition for Rehearing to include the additional ground of the decision of this Court lacking the concurrence of the required majority of qualified Judges because of disqualification of the Judges (Rule 29(a)(3)), and we may take any steps necessary to obtain evidence and confirmation of the disqualification of the Members of the Court. As the Court is aware, there are severe time constraints because this Court's jurisdiction to grant rehearing will expire on June 17, 1988, and the deadline for filing Petition for Review in the Supreme Court if rehearing is not granted by this Court is June 27, 1988.

In summary, there is conclusive disqualification of a majority of the panel because of financial interest. In addition, the entire panel is disqualified, we submit, under the rules announced in C.C.P. § 170.1(a)(6)(A), (B) and (C), which require Judges (including Justices) to disqualify themselves when, for any reason, the Judge believes his recusal would further the interest of justice, or the Judge believes there is a substantial doubt as to his

capacity to be impartial, or even where a third person, aware of the facts, might reasonably entertain a doubt that the Judge would be able to be impartial. Beyond this, the Code of Judicial Conduct, adopted by the Conference of California Judges, provides in Canon 3, subsection C that a Judge should disqualify himself when his disqualification is required by law *or* his impartiality might reasonably be questioned, including, but not limited to, instances where he has a personal bias or prejudice concerning (i.e. for or against) a party. The Commentary to subsection C points out that the Canon may require more disqualification than the statute (C.C.P. § 170.1) may require because of the need to maintain public confidence in the integrity and impartiality of the judiciary.

As shown in subsequent discussion, when tested by these very strict standards, the entire panel is disqualified and should grant rehearing to vacate the decision made by a disqualified panel, and the members of the panel should then recuse themselves to avoid even the *appearance* of being unable to be fair and impartial in judging these appeals.

II

GOVERNING LAW AND RULES

The *procedures* specified in C.C.P. § 170.1 *et seq.* (formerly C.C.P. § 170) apply only to trial court judges, but the *grounds* for disqualification specified in the statute apply to appellate court Justices, as well. *Giometti v. Etienne* (1934) 219 Cal. 687, 689; *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 937. Thus, when an appellate court Justice is presented with a request to disqualify himself, he decides the issue himself, rather than having an outside judge decide the issues, as is the procedure for disqualification of trial court judges. However, the appellate Justice still must make his decision based on the *same grounds* of disqualification.

C.C.P. § 150.1(a)(3) provides that a Judge (or Justice) is disqualified if he has a "financial interest" in the subject matter of the proceeding, or in a party. Section 170.1 is a 1984 statutory revision of former C.C.P. § 170 *et seq.* Section 170.1 thus repre-

sents the substitution of a general, or categorical, term (i.e., "financial interest") to encompass all financial interests, including, but not limited to, the specified or specific financial interests which were described in former C.C.P. § 170. Among the specific or specified financial interests set forth in former § 170 which disqualified a Judge were subsection (2) ownership of any capital stock, bond, note, or other security issued by a corporation which was a party to the action, and subsection (3) which provided for disqualification of the Judge if he is indebted, through money borrowed as a loan, to a party to the action. Accordingly, a Justice of an appellate court is financially interested, and thus disqualified, if he owns capital stock of a corporate party to the appeal, or if he is indebted on a loan to a party to the appeal.

C.C.P. § 170.1(a)(6) provides that a Judge is disqualified if:

> . . . for any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

This standard for disqualification provided in C.C.P. § 170.1(a)(6)(C) establishes fundamentally an objective test and standard. It represents a legislative judgment that, due to the sensitivity of the question and inherent difficulties of proof, as well as the importance of public confidence in the judicial system, the issue is not limited to the existence of an actual bias. Rather, if a reasonable person would entertain doubts concerning the Judge's impartiality, disqualification is mandated. To ensure that proceedings appear to the public to be impartial and hence worthy of their confidence, the situation must be viewed through the eyes of the objective person. This standard indicates that the decision is not based on the Judge's personal view of his own impartiality. *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104. In *United Workers,* the Court holds:

> A judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. (170 Cal.3d 104.)

The Supreme Court confirms the paramount importance of maintaining public confidence in the integrity and impartiality of the judiciary in *People v. Thomas* (1972) 8 Cal.3d 518, where the Court states:

> The object of section 170 "is not only to guard jealously the actual impartiality of the judge but also to insure public confidence . . . . (8 Cal.3d 520.)

This same approach is taken and expanded upon and emphasized in the Code of Judicial Conduct adopted by the Conference of California Judges. Canon 3, subsection C provides:

> A judge should disqualify himself in a proceeding in which his disqualification is required by law, *or his impartiality might reasonably be questioned*, including but not limited to instances where:
>
> (a) He has a personal bias or prejudice concerning a party . . . .

The Commentary to Canon 3, subsection C provides:

> Because the Code emphasizes the appearance as well as the fact of propriety, Canon 3C(1)(a) may require more disqualification than the statute requires . . . .

III

APPLICATION OF LAW AND RULES TO FACTS OF THE PRESENT APPEALS

Since the disclosure statements filed by Justice Newsom indicate a continuing financial interest in the Bank of America up to and including the end of 1987, we submit that the panel is disqualified if influenced in its conferences and considerations of the appeals by even one disqualified member of the panel.

Moreover, we know of no evidence to change the statement made by Justice Racanelli that he owns stock in the Bank of America as of April 1986, and we know of no change in that condition or situation to and including the present date. Accordingly, Justices Racanelli and Newsom were disqualified at the time of hearing oral argument and later deciding the case, and the

decision should be vacated by grant of rehearing on grounds of disqualification of a majority of the panel.

We submit that a consideration of how the situation and facts would appear to the average person on the street necessarily results in a conclusion that such person would entertain a reasonable doubt as to the ability of the entire panel to be fair and impartial, based upon consideration of the following facts.

The decision of this case represents a complete departure from the usual rules of appellate review for the reasons set forth in the Petition for Rehearing. This Court's decision, rested as it is upon the incorrect conclusion that the evidence is insufficient to support the verdicts and judgments, constitutes a repetition of this Court's identical decision and reasoning in the *Sanchez-Corea* case, which was overturned by the decision of the Supreme Court, explicitly finding that there was sufficient and substantial evidence to support the verdicts and judgments.

In addition, a former Justice of this Court has been for several years employed by the Bank of America as its Director of Litigation. It is difficult to believe that the Members of this Court could have completely forgotten to announce their own disqualification at the oral argument, having in mind that two arguments had to be had in the *Sanchez-Corea* case because the pro-tem Justice, after the appeal had been under submission for two months, announced his disqualification because of his ownership of stock in the Bank.

In summary, we submit the entire panel is disqualified because, to the average person on the street knowing all of the foregoing facts, it would appear that there is a reasonable doubt as to the ability of the entire panel to be fair and impartial in passing upon these appeals. Accordingly, the panel should grant rehearing to vacate its decision, and disqualify and recuse itself.

Dated: June 10, 1988

Respectfully submitted,

Lukens, Cooper, Perry &
Drummond
William M. Lukens
Carol G. Perry

Frederick E. Watson,
A Professional Corporation
Frederick E. Watson

Khourie, Crew & Jaeger
Eugene Crew
Michael N. Khourie

By William M. Lukens

By F. E. Watson
Attorneys for Plaintiff,
Respondent and
Cross-Appellant
Irene O'Connell Kruse

PROOF OF SERVICE BY MAIL
[CCP § 1013a]

I, JENNIFER RYAN, hereby declare:

My business address is One Maritime Plaza, Suite 1600, San Francisco, California, in the City and County of San Francisco. I am over the age of eighteen years and I am not a party to the within cause. I am readily familiar with the practice of my office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence deposited with the United States Postal Service that same day in the ordinary course of business.

On June 10, 1988, I served the attached Memorandum of Points and Authorities in Support of Plaintiff-Respondent and Cross-Appellant Irene O'Connell Kruse's Request That the Justices of Division One Grant Rehearing and Disqualify and Recuse Themselves by depositing a true copy thereof in a sealed envelope with postage fully paid in the United States Mail at San Francisco, California on the following at the addresses listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 10, 1988, at San Francisco, California.

Jennifer Ryan

Proof of Service List for *Kruse v. Bank of America*

Warren Christopher
Karen Growdon
O'Melveny & Myers
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A. Barry Cappello
Thomas G. Foley, Jr.
Frances E. Komoroske
Cappello & Foley
831 State Street
Santa Barbara, California 93101

APPENDIX P

DECLARATION OF DOLLY ARES

1. I am an attorney duly licensed to practice law before all the courts of the State of California and have personal knowledge of the following facts.

2. I was present at oral argument before the First District, Division One of the Court of Appeal on April 29, 1986. I was appearing as counsel for Respondent Richard E. Alexander in the case of Alexander v. Alexander, Case No. A023629, which was also on the calendar.

3. Prior to Alexander v. Alexander, another case was called which apparently involved the Bank of America. Prior to appellant's counsel beginning his oral argument, Presiding Justice Racanelli made a statement to the

effect that he owned a few shares in the Bank of America and should disqualify himself. Justice Newsom then stated that he had a loan from the Bank of America and did that disqualify him too? Appellant's counsel then stated he was willing to proceed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 day of June, 1988 at San Jose, California.

/s/ Dolly Ares

DOLLY ARES

DECLARATION

Calvin F. Gunn, under penalty of perjury, declares as follows:

I am an attorney licensed to practice in the State of California with my offices located at 2345 Yale Street, Palo Alto, California. On April 29,

1986, I was in attendance at the afternoon session of Division One of the Court of Appeal for the First Appellate District in San Francisco, in the case of Albert C. Johnson v. Daon Corp. I was awaiting my turn for oral argument and I recall that in connection with another oral argument which preceded mine, involving the Bank of America, one of the Justices on the panel stated that he owned some stock in the bank and the other Justice stated that he had a loan from the same bank, and that they were disclosing this information. I do not remember which Justice made which statement, but I do recall that Justices Elkington, Racanelli and Newsom were sitting on the panel that day because I made an oral argument in my case shortly thereafter.

The foregoing information is within my personal knowledge and if called as a witness, I could competently testify thereto.

Executed in Palo Alto, California, June 23, 1988.

/s/ Calvin F. Gunn

Calvin F. Gunn

DECLARATION

GUITY DEYHIMY, under penalty of perjury, declares as follows:

1. I am an attorney licensed to practice in the State of California, with my offices located at 220 Montgomery Street, Suite 1031, San Francisco, California.

2. On April 29, 1986, I was in attendance at the courtroom proceedings before Division One of the Court of Appeal of the First Appellate District

of San Francisco which included on calendar the case of Frank Barberis v. Bank of America. A matter in which I was involved as an attorney with Calvin Gunn, Esq. was Johnsen, et al. v. Daon Corp., which had also been scheduled for 9:00 a.m. on that day. I had also been scheduled to appear at a status conference, I believe, at 8:45 a.m. that same day in the Federal District Court for the Northern District of California, in the matter of Prescott v. Miller. I recall having requested that the federal matter be heard before others on that calendar so that I would be able to go across the street to observe the Court of Appeal in its decision-making process in the Johnsen case, scheduled for hearing or decision on the same day, although oral argument had been waived. I do not recall whether our matter was

heard in the morning or was continued into the afternoon calendar. While I was awaiting our case, I recall that one of the justices in another case, involving the Bank of America, offered to disqualify himself because of an interest he had in the Bank. I believe the Judge who offered to disqualify himself was Justice Racanelli. There was some discussion of the matter, when another judge made a similar statement, which was followed by some lighthearted comment regarding the pervasive presence of the Bank in California.

The foregoing information is within my personal knowledge, and if called as a witness I could competently testify thereto.

Executed this 6th day of July, 1988, at San Francisco, California

/s/ Guita Deyhimy

GUITA DEYHIMY

APPENDIX Q

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Attorneys for Plaintiff and Petitioner
Irene O'Connell Kruse

In the Supreme Court of the State of California

No. A033063/A039161

(Sonoma County Superior Court No. 112439)

Irene O'Connell Kruse,
Plaintiff, Respondent and Cross-Appellant,

v.

Bank of America National Trust and Savings Association,
Defendant, Appellant, Cross-Respondent and Respondent

[Filed June 27, 1988]

Petition for Review
of Decision of the Court of Appeal
First Appellate District

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INTRODUCTION

Filed in November of 1980, this case is one of the first, and perhaps the most important, of the lender liability cases in the United States. It casts a widowed farming lady, Mrs. Irene O'Connell Kruse, against the largest and most influential bank in the State of California, the Bank of America.

This petition seeks review of a shocking decision issued by Division One of the First Appellate District reversing a judgment in favor of Mrs. Kruse in the amount of $3.77 million, after a three month jury trial, and awarding costs to the Bank of America.

The panel was disqualified, and review must be granted under Rule 29(2) and (3), to vacate the void decision. Review must also be granted to vacate the decision because of a denial of due process and equal protection rights, by denial of a fair, just, and impartial appellate review.

This Court should in addition grant review of the merits of the appeals, rather than retransfer to the Court of Appeal for rehearing, because in light of the magnitude of the case, and its nationwide significance, review on the merits is dictated in order to settle important questions of law and to secure a uniformity of decisions.[1]

Mrs. Kruse's case represents the first major lender liability case to be presented to this Court *on the merits*, is already being cited throughout the country, and because of the bizarre and far reaching departure from appellate procedures and the disqualification of the panel mandates review by the Supreme Court of the State of California.

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[1] Opposing counsel has been quoted after the decision as saying that the decision "contained important rulings and clarifications that should have a significant effect in other pending lender liability cases." BNA Lender Liability News, Vol. I, No. 1, June 15, 1988, p. 9.

QUESTIONS AND ISSUES PRESENTED

1. Does it violate the plaintiff's due process and equal protection rights under the Fourteenth Amendment of the United States Constitution, and Article 1 § 7 of the California Constitution, when the Court of Appeal rejects and ignores the basic rules of appellate review, by (1) not reviewing the actual legal theories pleaded and proven by plaintiff, and instead reviewing different legal theories suggested by the defendant Bank, and (2) not viewing the evidence in the light most favorable to the verdict?

2. Was the Court of Appeal decision invalid because some or all of the justices were disqualified, so there was no concurrence in the decision by the required majority of qualified Justices or jurisdiction of the Court of Appeal?

3. May the Court of Appeal find inconsistency between the claims of Mrs. Kruse and the Jewells, when in fact they are *not* inconsistent and are easily reconcilable?

4. Is a bank liable for perpetration of intentional torts upon its customers or borrowers, to the same extent, no more, no less, than other intentional tortfeasors, even though the commission of the tort occurs during the initial Bank's attempts to advance its own business and banking interests, and thus falls within the scope of so-called lender-liability law?

STATEMENT OF THE CASE

In January of 1979, plaintiff Irene O'Connell Kruse, now 73 years of age, was fraudulently induced by the Bank of pledge control of her family business to a third party, the Jewell family, in reliance on the Bank's representation that it would provide long term financing for the expansion of her company's fruit and vegetable operations near Sebastopol, California. The company's properties included plaintiff's family homes and orchards. Mrs. Kruse pledged her controlling interest to the Jewells as the Bank requested, but the Bank refused to complete the promised financing, collapsing the business into bankruptcy and making it impossible for Mrs. Kruse to obtain the return of her stock.

In July of 1985, a Sonoma County jury awarded Mrs. Kruse the sum of $9.445 million, which included $2.67 million in compensatory damages for fraud and intentional interference with prospective economic advantage, $100,000 in compensatory damages for emotional distress, and $6.675 million in punitive damages. The trial judge, the Honorable Laurence K. Sawyer, on motion for new trial, upheld the compensatory awards, but reduced the punitive award to $1 million. Mrs. Kruse accepted the remittitur, but the Bank appealed the Judge's ruling and asked for a further reduction or reversal of the award, even as remitted. Mrs. Kruse filed a cross-appeal asking for reinstatement of the original award.

* * * * *

ARGUMENT

A. WHEN A COURT OF APPEAL REJECTS AND IGNORES THE BASIC RULES OF APPELLATE REVIEW BY 1) NOT REVIEWING THE ACTUAL LEGAL THEORIES PLEADED AND PROVEN BY PLAINTIFF, AND INSTEAD REVIEWING DIFFERENT LEGAL THEORIES SUGGESTED BY DEFENDANT BANK, AND 2) NOT REVIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE VERDICT, PLAINTIFF IS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 7 AND 16 OF THE CALIFORNIA CONSTITUTION

1. Plaintiff Has A Right To Due Process And A Jury Trial

On the Bank's appeal, plaintiff's judgment was reversed, on the ground that supposedly, as a matter of law, there was no substantial evidence to support the jury's verdict. The decision was rendered by a panel of Division One consisting of Presiding Justice Racanelli, and Associate Justices Elkington and Newsom.

In order to produce a result-oriented decision, the Court of Appeal blatantly ignored the evidence of the case, substituted the

Bank's facts in place of the plaintiff's facts, weighed the evidence and made factual rulings on the sufficiency of the evidence on the issues of liability, causation and reasonable reliance, refused to view the evidence as a whole, did not allow petitioner the benefit of her evidence, did not allow petitioner the benefit of all inferences and presumptions that could be drawn from the evidence and did not resolve all, or any, conflicts in the evidence in favor of petitioner or conform in any respect to the established rules governing appellate review. As if this were not enough, two members of the panel were required by law to disqualify themselves because of outright ownership of . . .

* * * * *

. . . apply to uniformity of fair and just *decision making process*, in the various Districts of the Court of Appeal. Beyond this, there is an even more fundamental reason why review of this Court is mandated in the present case. We respectfully submit that this Court, created under the California Constitution as the highest Court of the State, is charged with the duty of supervising the lower Courts, to insure that the federal and state constitutional rights of litigants in the Courts of California to a fair and just trial and appellate review are enforced, and not violated, by the lower courts. To that end, we submit, that this court must exercise its powers of review to correct and remedy any such violations of the fundamental constitutional right to fair trial and fair appellate review. Only by this means, can this Court maintain confidence in the integrity and impartiality of the California judicial system.

B. THE SUPREME COURT MUST REVIEW THIS DECISION TO VACATE THE INVALID AND VOID DECISION BY DISQUALIFIED JUDGES

Independently of the infringement of due process and equal protection constitutional rights, the Court of Appeal decision was and is invalid merely because one, two, or all three of the Justices were disqualified, for the reasons referred to above, and there was therefore not a qualified majority of Justices to concur in the decision, as required by Article 6, § 3 of the California State Constitution. Moreover, the decision by the disqualified Justices was not merely voidable, but rather void, and the law is settled

that there was therefore a lack of jurisdiction in the Court of Appeal to render the decision. *Giometti* . . .

* * * * *

For the reasons stated above, we respectfully request review by this court.

Dated: June 27, 1988

Respectfully submitted,

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In the Supreme Court of the State of California
No. S006208

Court of Appeal No. A033064/A039161

Sonoma County Superior Court No. 112439

Irene O'Connell Kruse,
Plaintiff, Respondent and Cross-Appellant,

v.

Bank of America National Trust and
Savings Association,
Defendant, Appellant, Cross-Respondent
and Respondent.

Plaintiff Petitioner Irene O'Connell Kruse's Memorandum of Points and Authorities In Reply to Opposition to Motion to Take Evidence Under Rule 23(b); and for Discovery

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* * * * *

. . . in *SCA Services, Inc., v. Morgan, supra*:

> ". . . This case raises important public issues concerning the interpretation and application of the [disqualification] statute and affecting public confidence and trust in the impartiality of the judicial system." (557 F.2d at 113)

The just-quoted words apply with full force to the present case, and the motion to take evidence must be granted. The request for discovery in advance of the evidentiary hearing should likewise be granted, because on issues of great public importance, where it is so critical to obtain all the facts bearing upon those issues, the consensus of modern day courts is that the search for truth is greatly facilitated and expedited, by having discovery in advance of the evidentiary hearing.

III

THERE IS NO MERIT TO THE BANK'S ARGUMENT THAT NO PRIMA FACIE SHOWING OF DISQUALIFICATION HAS BEEN MADE, TO JUSTIFY TAKING EVIDENCE AND DISCOVERY ON THAT ISSUE:

The Bank argues that moving party, Mrs. Kruse, has supposedly not produced evidence sufficient to make prima facie showing, that would warrant a judicial factual investigation into the issue of disqualification. (B.Opp. 2-3) This argument is completely erroneous.

1. Deliberate Denial of Due Process is Sufficient in Itself, to Make Prima Facie Showing of Disqualification:

As shown in Plaintiff's Petition for Review (pp. 12-15), the Court of Appeal Justices did not review the legal theories and causes of action pleaded by plaintiff, and on which she recovered verdict and judgment. Rather, the Court reviewed subtly altered and distorted *variations* of plaintiff's legal theories, which were supplied and suggested to the Court, by counsel for the Bank in its briefs. Those "strawman" arguments were then set up by the Court in its opinion, and just as quickly knocked down, since there was no evidence in the record to support those counterfeit theories. The Court then ignored plaintiff's actual legal theories,

and completely disregarded the abundant evidence in the record to support plaintiff's verdict and judgment. This basing of the appellate decision on theories and issues different from those relied upon in the Trial Court, was a flagrant denial of due process. Due process does not require the state to make any appeal process available, but when appeal process is made available, it is part of the "process" which must be "due," and the appellate review must be applied equally, and not arbitrarily. *Frank v. Mangum*, 237 U.S. 309, 327; 59 L.Ed. 969, 980 (1915); *National Union of Maritime Cooks and Stewards v. Arnold*, 348 U.S. 37, 43; 99 L.Ed 46 (1954). Therefore, as held by the Supreme Court in *Cole v. Arkansas*, 333 U.S. 196; 92 L.Ed. 644 (1948):

> "... To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised [on appeal] *on consideration of the case as it was tried and the issues were determined in the trial court.*" (333 U.S. at 201; 92 L.Ed. at 648, emphasis added)

The rule is the same in civil as well as criminal cases. Thus, in *Spevack v. Kline*, 385 U.S. 511; 17 L.Ed.2d 574 (1967), a New York attorney was required, under State Bar Rules to keep records concerning his contingent fee cases, and he was disbarred when he refused to produce financial records, on grounds of self-incrimination. The disbarment was ordered on the theory that the privilege against self-incrimination *did* apply to the records, but an attorney could be disbarred for invoking the privilege to not produce the records. The New York Court of Appeals affirmed the disbarment on the different theory that the privilege did *not* apply to the records in the first place. In reversing, the Supreme Court held:

> "... The Court of Appeals was the first to suggest that the privilege against self-incrimination was not applicable *to the records*. Petitioner, however, had been disbarred on the theory that the privilege was applicable *to the records*, but that the invocation of the privilege could lead to disbarment. His disbarment cannot be affirmed on the ground that the privilege was not applicable in the first place. *Cole v. Arkan-*

sas, 333 U.S. 196, 201 . . . " (385 U.S. at 518; 17 L.Ed.2d at 579, emphasis in the original)

The denial of due process by basing the appellate decision on legal theories and causes of action different than those pleaded and recovered on in the Trial Court, was compounded by the refusal of the Court of Appeal to weigh the evidence in the light most favorable to the verdicts and judgments. This was an exact repetition by Division One, of its wrongful conduct in *Sanchez-Corea v. Bank of America*. Moreover, when this violation of due process was brought to the attention of the Court of Appeal by Petition for Rehearing, the reaction of the Court was not to grant rehearing and review the issues and theories on which plaintiff recovered verdict; rather, the Court rendered a modified opinion upon denial of rehearing, and inserted a finding that the evidence was supposedly insufficient to show justifiable reliance by the plaintiff (an elderly widow) on the fraudulent representations of the Bank. That issue had *never* been raised by the Bank in the Trial Court, or even on appeal, since the Bank always conceded that plaintiff justifiably relied, and the Bank only disputed whether it had made the alleged misrepresentations. This greatly aggravated denial of due process.

A disinterested observor of the foregoing conduct could reasonably conclude that the actions were a deliberate denial of due process to the plaintiff, and a favoring of the Bank, and thus conclude that there was at the very least, a reasonable doubt of the impartiality of the Justices. Thus, a prima facie showing of disqualification may rest upon this conduct alone.

2. The Admissions of Past Disqualification Conclusively Show Present Disqualification, Or at Least Make a Prima Facie Showing Of Present Disqualification:

At the outset, as shown in Plaintiff-Petitioner's Opening Memorandum in support of the present motion, if her argument of non-repeal of former CCP § 170, as to *appellate court Justices,* is accepted, and that former statute is still in effect as to appellate Justices, then any debtor or creditor relationship to a party is absolutely disqualifying, and both Justices Racanelli and New-

som, by their own admission had a debtor relationship to the Bank, and were absolutely disqualified to hear these appeals.

Moreover, even assuming this Court should decide that former CCP § 170 was repealed, even as to appellate court Justices, the admissions by Justices Racanelli and Newsom of their past disqualification, and the failure of both Justices to offer any explanation.

* * * * *

. . . first made a full written disclosure on the record, of the basis for disqualification; and that of course did not happen in this case.

Dated: July 21, 1988

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In the Supreme Court of the
State of California

No. S006208

Court of Appeal No. A033064/A039161

Sonoma County Superior Court No. 112439

Irene O'Connell Kruse,
Plaintiff and Respondent,

George R. Jewell and Charles Duck, Trustee of the Bankruptcy Estate of George M. Jewell and Laura E. Jewell,
Cross-Complainants and Respondents,

v.

Bank of America, N.T.&S.A.
Defendant, Cross-Defendant and Appellant.

[Filed July 27, 1988]

Reply to Answer to Petition for Review

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I

INTRODUCTION

Under Rule 28(d) where the Answer to a Petition for Review ("Petition") presents additional issues for review, a Reply to the Answer is permitted, limited to those additional issues. The Bank's Answer does present additional issues, and this Reply is filed to respond to those additional issues. In addition, on the unusual facts of this case, it is necessary and proper to include vitally important expansions upon, and additions to, the legal and factual arguments set forth in the Petition, as will be shown below. First, however, an important preliminary matter needs to be discussed.

1. Plaintiff's Claim of Disqualification and Violation of Her Constitutional Rights Are Meritorious and Asserted in Good Faith:

The Bank falsely implies that there was no error in the Court of Appeal's decision, and that counsel for plaintiff have resorted to making false and "irresponsible" charges against Justices Racanelli and Newsom, for some reason. (B.Ans. 2 and 27) The apparent reason for this personal attack upon counsel for Plaintiff is to prejudice her counsel in the eyes of this Court and prevent grant of review. If this is the Bank's purpose, it is destined to fail.

The Supremacy Clause of the United States Constitution makes it *mandatory* for this Court to grant review and exercise its jurisdiction to decide Plaintiff's contention that the Court of Appeal deprived her of property (i.e., her $4 million judgment) without due process of law, and without equal protection of the laws, in violation of her federal constitutional rights, and that the decision of the Court of Appeal is therefore invalid and must be vacated. The duty and obligation of this Court to hear and decide those federal constitutional claims exists regardless of this Court's ultimate decision on those constitutional issues.

Despite the fact that the Bank's unfounded attack upon counsel for Plaintiff cannot prevent grant of review, we do not wish to allow that unfounded attack to go unanswered. We have asserted the issues regarding disqualification and violation of constitutional

rights in good faith and because we believe that this Court will find those contentions to be true. We take no pleasure in making such charges, and would greatly prefer not having had to assert them, but since the grounds for disqualification exist, and the violations of constitutional rights occurred, and have most certainly influenced, if not dictated the bizarre reversal of Plaintiff's judgment, we are under a duty to prevent further gross injustice to Plaintiff. The Bank's argument that we have made charges against the Justices which we cannot prove is a completely specious argument. Neither Mrs. Kruse nor her attorneys would gain *anything* by obtaining review, unless this Court then found her claims to be true.

2. It is Necessary and Proper to Include in This Reply Matters Which Go Beyond Response to New Issues Raised in the Answer:

It is necessary and proper[1] to include in this Reply, arguments which go beyond response to new issues asserted in the Bank's Answer, for the following reasons:

The original decision was filed May 18, 1988. Thereafter, we were engrossed in filing the Petition for Rehearing, and the Request for Disqualification, and amendments thereto, until June 17, 1988, when the Court of Appeal denied both the Petition and the Request. In the ten days remaining before the Petition for Review had to be filed in this Court, it was simply not possible to fully prepare, and fully present in the Petition, what amounted to a whole new "case," on the issues of disqualification of the Justices and their violation of Plaintiff's constitutional rights.

To illustrate, we requested the Justices to make full disclosure on the record of all facts bearing upon their alleged disqualification, but they refused to do so, and we therefore included in the Petition the facts and information which we had available at that time. Subsequent to filing the Petition, our continuing legal research and factual investigation has yielded further evidence to support the claim that the Justices were biased in favor of the Bank, including the startling discovery of Justice Newsom's close

---

[1] See discussion of Authorities at page *infra*.

family ties to the Bank of America, which he has consistently to this day, concealed and never disclosed. Justice Newsom's grandfather, William A. Newsom, was one of the founding shareholders and officers of the Bank of America (Bank of Italy) whose shareholderings in 1918 were second in number only to those of the Bank's founder, A. P. Giannini. William A. Newsom became the Branch Manager for the very first Branch Office of the Bank, and finished a 23-year career with the Bank as Vice President and Chairman of the Advisory Board of the Bank. Justice Newsom's father, William A. Newsom, Jr., and Justice William A. Newsom himself, carried on the close relationship to the Bank. (See Exhibit "A" attached hereto.)

Therefore, we have included hereinafter, additional legal and factual support for Plaintiff's claims, which has been developed by legal research and factual investigation subsequent to the filing of the Petition.

II

THE PROCEDURAL RULE RESTRICTING THIS REPLY TO DISCUSSION OF NEW ISSUES RAISED IN THE ANSWER, MAY BE DISREGARDED, BECAUSE ISSUES OF GREAT PUBLIC IMPORTANCE ARE INVOLVED HERE:

In this case, the issues of disqualification of the Justices of the Court of Appeal, because of alleged conflict of interest, and bias and prejudice, are issues which concern and affect public confidence in the integrity and impartiality of the judiciary, and are therefore issues of great public importance. In such cases, the usual procedural rules may be disregarded. *Roe v. Wade* (1973) 410 U.S. 113, 35 L.Ed.2d 147, 161 [Moot case on appeal will still be decided if issues of great public importance]; *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437 (5th Cir. 1968):

> "... But, as we several times make clear, this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. Whatever might be the usual consequences of res judicata,

collateral estoppel or doctrines akin to them, we reject them here. They are not a bar or defense here or below." (403 F.2d at 439-440)

Accordingly, we will discuss later the additional issues presented in the Bank's Answer, and will first discuss additional, vitally important and controlling points, such as the fact that the Supremacy Clause makes it mandatory for this Court to grant review and exercise jurisdiction.

III

IT IS MANDATORY THAT THIS COURT GRANT REVIEW AND EXERCISE JURISDICTION TO ENFORCE AND PROTECT PLAINTIFF'S FEDERAL CONSTITUTIONAL RIGHTS:

Article VI of the United States Constitution contains the Supremacy Clause, and a clause which requires every judicial officer in the nation to take an oath of office to uphold and enforce the federal constitution.[2]

Article 20 § 3 of the California Constitution, implements Article VI of the Federal Constitution, by prescribing an oath of office to be taken by all Judges and Justices to support and defend the federal Constitution.

In *Cooper v. Aaron,* 358 U.S.1; 3 L.Ed.2d 5, (1958), the Court holds that the federal Constitution *as construed by the United States Supreme Court* ("Supreme Court"), is the supreme law of the land, and that:

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[2] The pertinent language is as follows:
". . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
. . . [A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . "

> " . . . No state . . . judicial officer can war against the Constitution without violating his undertaking to support it." (358 U.S. at 18; 3 L.Ed.2d at 17)

In *Martin v. Hunter's Lessee,* 1 Wheat. 304, 339; 4 L.Ed. 97, 106 (1816); *Claflin v. Houseman,* 93 U.S. 130, 136-137; 23 L.Ed. 833, 838-839 (1876); and the *Second Employer Liability Cases,* 223 U.S. 1, 58; 56 L.Ed. 327, 349 (1912), the Supreme Court establishes the law that every state court of competent jurisdiction, has a *mandatory* duty to exercise its jurisdiction over and to decide, claims based upon rights granted under the federal Constitution or federal statutes. In *Miller v. Municipal Court* (1943) 22 Cal. 2d 818, this Court, citing the Supremacy Clause, as construed by the Supreme Court in the foregoing cases, held:

> ". . . But, considering the intent of the framers of the Constitution, the acts of the early Congresses, and the provisions of Article VI establishing the supremacy of federal law, it seems clear that a state court, otherwise competent to exercise jurisdiction over the subject-matter, the parties, and the amount in controversy, *must assume jurisdiction of an action created by federal law* and enacted pursuant to a legitimate federal function, regardless of whether or not that action be considered either as penal or as furthering the governmental interest.
>
> Any argument of hardship which, it may be asserted, will result from the additional burden of litigation in state courts, must be considered settled by the Supreme Court of the United States. 'We are not disposed,' the court observed, 'to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, if affords no reason for declining jurisdiction conferred by law. *The existence of the jurisdiction creates an implication of duty to exercise it,* and that its exercise may be onerous does not militate against that implication.' . . ." (22 Cal.2d at 851, emphasis added)

Accordingly, plaintiff has a right, guaranteed under the federal Constitution, not to be deprived of property (i.e. her $4 million judgment against the Bank), by the Court of Appeal, without due

process of law, or without equal protection of the laws. Therefore, she has a claim or cause of action, created by federal law, to vacate and reverse the decision of the Court of Appeal, which deprived her of her judgment-property, in violation of her federal constitutional rights. The sole and only California Court which has jurisdiction to review and reverse the decision of the Court of Appeal, is this Court. Therefore, this Court, in its own words, "must assume jurisdiction of an action created by federal law."

IV

PLAINTIFF'S CLAIMS OF VIOLATION OF HER FEDERAL CONSTITUTIONAL RIGHTS, ARE SOUND IN LAW AND ON THE FACTS:

A. Plaintiff was Denied Due Process By The Court of Appeal's Basing Its Decision on Legal Theories Different From Those Pleaded and Recovered On In the Trial Court:

As shown in Plaintiff's Petition (pp. 12-15) the Court of Appeal did not review the legal theories and causes of action pleaded by plaintiff, and on which she recovered verdict and judgment. Rather, the Court reviewed subtly altered and distorted *variations* of plaintiff's legal theories, which were supplied and suggested to the Court, by counsel for the Bank in its briefs. Those "strawman" arguments were then set up by the Court in its opinion, and just as quickly knocked down, since there was no evidence in the record to support those counterfeit theories. The Court then ignored plaintiff's actual legal theories, and completely disregarded the abundant evidence in the record to support plaintiff's verdict and judgment. This basing of the appellate decision on theories and issues different from those relied upon in the Trial Court, was a flagrant denial of due process. Due process does not require the state to make any appeal process available, but when appeal process is made available, it is part of the "process" which must be "due", and the appellate review must be applied equally, and not arbitrarily. *Frank v. Mangum,* 237 U.S. 309, 327; 59 L.Ed. 969, 980 (1915); *National Union of Maritime Cooks and Stewards v. Arnold,* 348 U.S. 37, 43; 99 L.Ed. 46

(1954). Therefore, as held by the Supreme Court in *Cole v. Arkansas,* 333 U.S. 196; 92 L.Ed. 644 (1948):

> "... To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised [on appeal] *on consideration of the case as it was tried and the issues were determined in the trial court.*" (333 U.S. at 201; 92 L.Ed. at 648, emphasis added)

The rule is the same in civil as well as criminal cases. Thus, in *Spevack v. Kline*, 385 U.S. 511; 17 L.Ed. 2d 574 (1967), a New York attorney was required, under State Bar rules to keep records concerning his contingent fee cases, and he was disbarred when he refused to produce the financial records, on grounds of self-incrimination. The disbarment was ordered on the theory that the privilege against self-incrimination *did* apply to the records, but an attorney could be disbarred for invoking the privilege to not produce the records. The New York Court of Appeals (the highest Court in New York) affirmed the disbarment on the different theory that the privilege did *not* apply to the records in the first place. In reversing, the Supreme Court held:

> "... The Court of Appeals was the first to suggest that the privilege against self-incrimination was not applicable *to the records.* Petitioner, however, had been disbarred on the theory that the privilege was applicable *to the records*, but that the invocation of the privilege could lead to disbarment. His disbarment cannot be affirmed on the ground that the privilege was not applicable in the first place. *Cole v. Arkansas*, 333 U.S. 196, 201..." (385 U.S. at 518; 17 L.Ed. 2d at 579, emphasis in the original)

Plaintiff in her Petition (pp. 12-15) points out specifically how the Court of Appeal failed and refused to review the sufficiency of the evidence to support *the actual causes of action pleaded* by plaintiff, and on which she recovered verdict and judgment. The Bank in its Answer to the Petition ("B.Ans.") does *not* deny this argument, and instead tacitly admits that the Court of Appeal based its decision on different theories than those pleaded by plaintiff. But the Bank then makes the specious argument that plaintiff was not aggrieved by this error, because (according to

counsel for the Bank) the evidence was insufficient, as a matter of law, to support the verdict, even on the theories pleaded by plaintiff. (B.Ans. 25-27)

There are two obvious fallacies in this argument. First, it is only counsel for the Bank who state that the evidence was insufficient to support the verdict even on the theories actually pleaded by plaintiff. By contrast, the *Court of Appeal* never reached that conclusion, because the Court of Appeal never reached that issue, since it never reviewed the sufficiency of the evidence to support the legal theories and causes of action actually pleaded by plaintiff. Implicit in the argument by counsel for the Bank, is the suggestion that the Court of Appeal would still have found the evidence insufficient to support the actual theories pleaded by plaintiff, if the Court of Appeal had reviewed those. This suggestion is at best unfounded speculation (that the Court of Appeal would have reached the same result upon a different review); and at worst it is an admission that the Justices were biased in favor of the Bank and were going to reverse plaintiff's judgment no matter what kind of review they conducted, and regardless of what the law and the facts were.

Second, and more fundamentally, the evidence is more than sufficient to support the causes of action and legal theories actually pleaded by Plaintiff. This is readily illustrated by examination of Plaintiff's cause of action for unjustified interference with prospective economic advantage, as pleaded in her Third Amended Complaint ("TAC"), copy of which appears as pages 589-604 of the Bank's Appellant's Appendix ("A.A."). The TAC pleads the interference was in two stages, and with two relationships. First, it is pleaded that the Bank, as a *third party* interfered with Plaintiff's relationship with, and her control over, her solely-owned corporation by inducing her to transfer and pledge controlling stock interest to Jewell, by false representation of the Bank's intention to give long-term financing to the company; and that but for her loss of control, the company would have obtained the long-term financing from another lender, and gone forward profitably.

Second, it is pleaded that the Bank as a *third party* interfered with the relationship between Plaintiff as pledgor and Jewell as pledgee, by refusing to give the long-term financing it had

represented it would give, and doing that with the intention to put the company out of business, to eliminate it as competition for the Co-op, thereby making it impossible for the company to repay its debt to Jewell, and thus preventing Plaintiff's redeeming her stock pledged as security for repayment of that debt, and denying Plaintiff the economic advantage resulting from redemption of her stock and resumption of her receipt of dividends and shareholder distributions from the company.

However, the Bank suggested, and the Court of Appeal accepted, a false "strawman" argument that the relationship pleaded as having been interfered with, was a two-party relationship between the Bank and the company; and that by refusing to make a long-term loan to the company, the Bank did not act as a *third party* interfering with Plaintiff's relationship to anyone, and the evidence therefore failed to support the interference cause of action. The Court of Appeal thus reviewed and reversed on a theory totally different from that pleaded, thereby denying Plaintiff due process.

Comparison of the other causes of action, as pleaded in the TAC, with the Court of Appeal's opinion, discloses the same review on theories different from those pleaded, as to all causes of action, with resultant denial of due process in the review of all causes of action on which Plaintiff recovered.

B. Plaintiff was Denied Equal Protection By The Court of Appeal's Refusal to View The Evidence in The Light Most Favorable to Her Verdict:

In *Lindsey v. Normet*, 405 U.S. 56, 77; 31 L.Ed. 2d, 36, 52; and *National Union v. Arnold*, 348 U.S. 37, 43; 99 L.Ed. 46 (1954), the Supreme Court holds that while the Fourteenth Amendment does not require a state to provide appellate review, where appeal is afforded, the appellate review must be applied equally, and not arbitrarily, or the equal protection clause is violated. Thus, equal protection was denied when Division One applied the standard rule of appellate review and viewed the evidence in the light most favorable to the judgment in all cases *except* in *Sanchez-Corea v. Bank of America* and in the present Kruse/Jewell appeals.

Here again, the Bank's Answer does *not* deny the accusation that the Court of Appeal failed to view the evidence in the light most favorable to the judgment. Rather, the Bank sidesteps the issue and advances the diversionary argument that there is no requirement that the reviewing Court adopt all or any portion of a Respondent's statement of facts, since, as held in *People v. Johnson*, 26 Cal.3d 557, 577, the reviewing Court must review the whole record and cannot focus entirely on isolated pieces of evidence. But *People v. Johnson* itself recognizes that the reviewing Court must review the whole record in the light most favorable to the judgment. (26 Cal.3d at 577)

The evidence must be viewed in the light most favorable to supporting the implied fact findings of the jury, which arise from *the pleadings. Price v. Bekins Van & Storage* (1918) 179 Cal. 326, 328.

The TAC pleads the facts showing the tortious and reprehensible wrongdoing conduct of the Bank, and the jury's verdict implies a finding that those pleaded facts were true. Plaintiff survived a motion for summary judgment before trial, a motion for nonsuit during trial, and a motion for new trial after trial; thus conclusively indicating there was more than substantial evidence when viewed in the light most favorable to the Plaintiff's case and her verdict.

Despite all this, the original and the modified opinions of the Court of Appeal *do not contain even one single fact* showing wrongdoing, or even hinting at wrongdoing, on the part of the Bank. This conclusively demonstrates that the Court of Appeal viewed the evidence in the light most favorable to the Bank, but thus violating Plaintiff's right to equal protection.

C. Plaintiff was Denied Due Process if even One Justice was Disqualified:

It is a denial of due process under the Fourteenth Amendment, if even one appellate Justice on a panel is disqualified. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 824, 829-833; 89 L.Ed.2d 823, 834-840 (1986); *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 873-874. The Bank errs in arguing that *financial interest* is the only basis for disqualification. (B.Ans. 6-

7) A non-financial *relationship* can give rise to a reasonable appearance of partiality, and this is disqualifying. *Liljeberg v. Health Services Acquisition Corp.* (U.S. Supreme Court No. 86-957, June 17, 1988). California Daily Opinion Service, 88 C.D.O.S. 4259, 4261-4262. As shown in Plaintiff's points and authorities in support of her Rule 23(b) Motion to Take Evidence there is an overwhelmingly strong prima facie case of disqualification, based on hearsay which can be converted to admissible evidence by an evidentiary hearing.

In summary, there are valid and substantial claims and contentions of violation of Plaintiff's federal constitutional rights, and we respectfully submit that it is therefore mandatory for this Court to grant review and exercise jurisdiction over the said claims and contentions.

V

THE BANK'S NEW ISSUE IS WITHOUT MERIT:

The Bank states it raises no new issues for review (B.Ans. 1), but in a footnote on that same page, contradicts that statement by asserting that if a review is granted, the Bank wishes review of additional points. The Bank then argues that neither Mrs. Kruse nor the Jewells seeks review on the merits. This is essentially correct, because both Mrs. Kruse and the Jewells seek to vacate the Court of Appeal's decision entirely, so there would then be no decision for this Court to review on its merits, or lack of same.

But the Bank then goes on to argue that the Court of Appeal "correctly applied settled rules of tort law". (B.Ans. 1-2) Were we to let that statement go unchallenged, it could be taken to be a concession that despite any disqualification of the Justice, and despite any violation of constitutional rights, the Court of Appeal reached a fair and just result, so there is no need for grant of review.

That is obviously false, and we strongly dispute the Bank's statement. The Court of Appeal did *not* correctly apply tort law rules, and not all of the tort law rules applicable can be regarded as "settled".

Dated: July 27, 1988

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July 29, 1988

The Honorable Acting Chief Justice
Of California
And The Honorable Associate Justices
Of the Supreme Court of California
4250 State Building
San Francisco, CA 94102

Re: Kruse/Jewell v. Bank of America, S006208

Dear Acting Chief Justice:

This letter brief is submitted to the Court, as a supplement to the Petition for Review filed by Plaintiff-Petitioner Irene O'Connell Kruse, and is submitted for the following reasons:

1. To perfect the record for appeal to the United States Supreme Court, under 28 U.S.C. § 1257(2), by drawing into question the validity of Rule 29, on the ground of its being repugnant to Article VI of the United States Constitution, if Rule 29 is applied by this Court, to deny review of Mrs. Kruse's claims and contentions of violation of her federal constitutional rights by the Court of Appeal.

2. To avoid the necessity for any appeal and petition for certiorari to the United States Supreme Court, by submitting one additional clarifying point of argument, to assure this Court that it has jurisdiction to review Plaintiff's federal constitutional claims and contentions, and is required under the United States Constitution to grant review and exercise that jurisdiction.

3. To respectfully suggest a procedure whereby this Court can grant review, do full justice between the parties, and perform its duty of supervision over the lower courts, to maintain public

confidence in the integrity and impartiality of the judiciary; but at the same time avoid publishing an opinion that reflects adversely on the Court of Appeal.

I

RULE 29 IS INVALID UNDER ARTICLE VI OF THE U.S. CONSTITUTION, IF APPLIED TO THIS CASE TO PRECLUDE GRANT OF REVIEW AND EXERCISE OF JURISDICTION:

In her Petition for Review (pp. 5-9, 12-21) and in her Reply to Answer to Petition (pp. 4-6) Mrs. Kruse claims violation by the Court of Appeal, of her constitutional due process and equal protection rights under the Fourteenth Amendment to the United States Constitution, and she further contends in her Reply that Article VI of the federal Constitution, as construed in decisions of the United States Supreme Court ("Supreme Court"), and the decisions of this Court in *Miller v. Municipal Court* (1943) 22 Cal.2d 818, makes it mandatory for this Court to grant review and exercise jurisdiction over her said claims and contentions of violation of her federal constitutional rights. In *Miller*, this Court holds that under the Supremacy Clause "it seems clear that a state court, *otherwise competent to exercise jurisdiction over the subject-matter*, the parties, and the amount in controversy, *must* assume jurisdiction of an action created by federal law . . ." (22 Cal.2d at 851, emphasis added).

Thus, Mrs. Kruse's contention that it is mandatory for this Court to grant review, is rested upon the basic premise that this Court *has jurisdiction over the subject-matter*, namely, jurisdiction to review the decision of the Court of Appeal, *on the ground* that the Court of Appeal reversed Mrs. Kruse's judgment in violation of her federal constitutional rights to a fair, just and impartial appellate review. Rule 29 does not list this as one of the grounds for review by this Court. Therefore, upon further reflection and research we believe it is necessary and proper to submit to this Court, the following additional argument to demonstrate that this Court does have jurisdiction to review on that ground, and that if Rule 29 were to be applied in this case to hold that

there is no jurisdiction to review the Court of Appeal decision, on that ground, then Rule 29 would be invalid because repugnant to the Supremacy Clause.

The first point to be noted is that *Miller v. Municipal* Court is not an isolated decision by this Court, but rather has been cited and followed by later decisions of this Court which uniformly recognize that it is *mandatory* for California State Courts to exercise jurisdiction over claims based upon the federal constitution or statutes. E.g. *Leet v. Union Pacific R.R. Co.* (1944) 25 Cal.2d 605, at 612-613:

> "... [T]he doctrine of *forum nonconveniens* is no justification for a state court to refuse jurisdiction of an action under the Federal Employers' Liability Act. Likewise, it is conclusive that the state court *must* take jurisdiction. It has no choice in the matter and no rule or policy on its part alters the situation." (Emphasis by the Court)

Accord: *McCarroll v. L.A. Carpenters* (1957) 49 Cal.2d 45, 61; *People Ex Rel Happell v. Sischo* (1943) 23 Cal.2d 478, 491 [California Constitution provisions inapplicable to extent conflict with federal constitution]; *Estate of Lindquist* (1944) 25 Cal.2d 697, 704-705.

The second point to be noted is that Article 6 § 12 of the California Constitution, as amended in 1984, provides in pertinent part as follows:

> "... (b) The Supreme Court may review the decision of a Court of Appeal *in any cause.*
> (c) The Judicial Council shall provide, by rules of court, for *the time and procedure ... for review ...*" (Emphasis added)

The just-quoted provisions of the California Constitution confer *unrestricted* and *unqualified* jurisdiction on this Court to "review the decision of a Court of Appeal in any cause." The authority conferred upon the Judicial Council to provide by rules of court for "the time and procedure for review," does not in any way limit or restrict the grant of substantive jurisdiction to review the decision of a Court of Appeal in any cause.

Rule 29 thus reflects a *rule of policy* adopted to *limit and restrict the exercise of jurisdiction*, to the three instances mentioned in Rule 29(a)(1), (2), and (3). But as held by this Court in *Miller* and *Leet, supra,* where the State Court (including this Court) has jurisdiction over the subject-matter, as it clearly does, then "the State Court *must* take jurisdiction. It has no choice in the matter and no rule or policy on its part alters the situation." (25 Cal.2d at 612-613) Thus this Court cannot by a rule of policy established in Rule 29 decline or refuse to exercise its jurisdiction to grant review and vacate the decision of the Court of Appeal, because it was reached and rendered in violation of Plaintiff's federal constitutional rights. If Rule 29 is applied in this case to deny review, then Rule 29 is invalid because in conflict with, and repugnant to, the Supremacy Clause.

The unique and distinguishing feature of this case, is that the federal question did not arise in the case presented in the Trial Court. Rather, the question of violation of the federal constitutional rights of Plaintiff arose for the first time in the Court of Appeal, from the conduct of that Court, in allegedly depriving Mrs. Kruse of her property (i.e., her $4 million judgment) without the due process of law and equal protection guaranteed under the Fourteenth Amendment. Thus, this Court is the sole and only California State Court of competent jurisdiction to review those federal constitutional claims, and vacate the Court of Appeal decision, if those claims are determined to be well-founded. Therefore, the Supremacy Clause mandates that this Court grant review and exercise jurisdiction to hear and determine those claims.

II

ONCE THIS COURT HAS GRANTED REVIEW ON ALL FEDERAL CONSTITUTIONAL ISSUES, ITS DECISION NEED NOT BE RESTED ON ALL GROUNDS, AND ITS DECISION NEED NOT REFLECT ADVERSELY ON THE COURT OF APPEAL:

For the reasons discussed above, this Court must grant review and exercise jurisdiction over *all* the federal constitutional issues

and claims raised by Plaintiff, as grounds for vacating and reversing the decision of the Court of Appeal. These are three in number. First, Plaintiff alleges a denial of due process by the Court of Appeal reviewing and reversing her judgment on legal issues and causes of action different from those pleaded and on which she recovered in the trial court. Second, Plaintiff alleges there was a denied of equal protection by the Court of Appeal not applying the standard rule of appellate review, to view the evidence in the light most favorable to Plaintiff's verdict and judgment. Third, Plaintiff alleges a denial of due process on the grounds that one or more of the Justices on the panel were in fact biased in favor of the Bank, or, alternatively, even if there was no actual bias in favor of the Bank, there was a reasonable appearance of such impropriety, so that one or more of the Justices was disqualified, and Plaintiff did not receive trial by a fair and impartial Court.

The three grounds are interrelated, but nevertheless separate and independent, and any one of the three is sufficient, by itself, as a ground for vacating and reversing the Court of Appeal decision. Moreover, a finding of proof of any one of the three grounds does *not* require a finding of any actual culpability or wrongdoing on the part of the Court of Appeal. Error on the part of Court of Appeal, in reviewing on theories different from those pleaded and recovered on in the trial court, is, in and of itself, without more, a denial of due process. Error on the part of the Court of Appeal in failing to view the evidence in the light most favorable to the judgment is, in and of itself, without more, denial of equal protection. Disqualification of one or more of the Justices on the ground of there being a reasonable appearance of bias in favor of the Bank is, in and of itself, without more, a denial of due process, and this is true even if there was in fact, no bias in favor of the Bank.

Accordingly, we submit that all of the claims of violation of federal constitutional rights, including that of actual bias in favor of the Bank, could be fully proved and established, from review of the existing record, and taking of evidence at an evidentiary hearing, after discovery to obtain evidence in admissible form to present at the evidentiary hearing; however, neither Plaintiff nor

her counsel, desire to achieve anything beyond vacating and reversal of the Court of Appeal decision, and the speediest possible disposition on the merits of the appeal and cross-appeals.

In summary, we respectfully submit that vacating and reversing of the Court of Appeal decision on the ground of error in allowing the mere reasonable appearance of bias in favor of the Bank, or error in reviewing on theories different than those pleaded in the trial court, or error in not viewing the evidence in the light most favorable to the judgment, would each and all be error warranting reversal of the decision of the Court of Appeal, which however would not demonstrate error any different from ordinary reversible error, and would not reflect any culpability on the part of any of the Justices.

Finally, we respectfully submit that the ends of justice would be best served by this Court reversing and vacating the decision of the Court of Appeal, and simultaneously, on its own motion, pursuant to Rule 27.5, transferring the cause to itself, and ruling on the merits of the appeal and cross-appeals, on the grounds that only in that manner can public confidence in the integrity and impartiality of the judiciary be maintained.

This is so, because if that is not done, and the appeals are remanded to a different division or a different district for review and decision, followed by possible grant of review by this Court, final disposition of the appeal and cross-appeals may require another year or two. In that event, Plaintiff who is now 73 years of age may not live to enjoy any of the benefits of her judgment, and may lose her family home in which she resides, because of the Federal District Court being unwilling to continue in effect its injunction against sale of her home as part of the bankruptcy proceedings of the O'Connell Company Corporation, which owns her family home. Public confidence in the integrity and the impartiality of the judiciary is not going to be furthered by subjecting Plaintiff to those hardships and injustices, even if the Court of Appeal decision were to be reversed on the grounds that there was a mere appearance of impropriety. By contrast, prompt resolution of the merits of the appeal and cross-appeals, by this Court, and a decision on the merits of a major lender liability case, by this Court, would reassure the public that this Court is

fully discharging its duty to monitor and supervise the lower courts to bring about the fair administration of justice in civil as well as criminal cases.

We have raised in Plaintiff's Reply, and expanded upon here, the fundamentally important and controlling point of mandatory grant of review by this Court, since we believed it was our duty to the client and to the Court, to do so. However, we recognize that counsel for the Bank may wish to respond, and we therefore respectfully request that the Court accept this Supplement for filing, and allow counsel for the Bank such response as is appropriate.

Respectfully submitted,

Lukens, Cooper, Perry &
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By: William M. Lukens

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FEW/jl
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Court of Appeal
Superior Court

APPENDIX R

Rule 23(b) of the California Rules of Court provides as follows:

> Proceedings for the production of additional evidence on appeal shall be in accordance with rule 41. The court may grant or deny the application in whole or in part, and subject to such conditions as it may deem proper. If the application is granted, the court, by appropriate order, shall direct that the evidence be taken before the court or a justice thereof, or before a referee appointed for the purpose. The court shall also prescribe reasonable notice of

> the time and place for the taking of the evidence and shall indicate the issues on which the evidence is to be taken. Where documentary evidence is offered, either party may submit the original or a certified or photostatic copy thereof and the court may admit the document in evidence and add it to the record on appeal.

Rule 29(a) of the California Rules of Court provides as follows:

> Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important

> questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

Rule 41 of the California Rules of Court provides as follows:

> Except as otherwise provided in these rules, all motions in a reviewing court shall be made by the filing of a typewritten motion, with proof of service on all other parties, stating the grounds of the motion, the papers, if any, on which it is based, and

the order or other relief requested. Each copy of the motion shall be accompanied by a memorandum of points and authorities, and if the motion is based on matters not appearing of record, by affidavits or other evidence in support thereof. Any showing in opposition to the motion shall be served and filed within 10 days after the service of the motion.

Supreme Court, U.S.
FILED
DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-918 (2)

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

Petitioners,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

No. 88-934 (2)

IRENE O'CONNELL KRUSE,

Petitioner,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

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MHPP

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-918

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

Petitioners,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

No. 88-934

IRENE O'CONNELL KRUSE,

Petitioner,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Respondent.

OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

Respondent Bank of America N.T. & S.A.* ("the Bank") respectfully requests that this Court deny the petition for writ of

* Bank of America N.T. & S.A. owns less than a 100% interest in the following of its subsidiaries: Banco Colombo Americano, Bank of America Australia Limited, Bank of America S.A.E., Bank of America (France) S.A.,

(Footnote Continued)

certiorari filed by Charles Duck, bankruptcy trustee of the estate of George M. Jewell and Laura E. Jewell, and by George R. Jewell (the "Jewells") and the petition for writ of certiorari filed by Irene O'Connell Kruse ("Kruse"). Both petitions seek review of the opinion of the California Court of Appeal, First Appellate District, Division One filed on May 18, 1988, and modified on June 17, 1988.

STATEMENT OF THE CASE

On May 18, 1988, the California Court of Appeal issued its opinion in *Kruse v. Bank of America* (as later modified and reported at 202 Cal. App. 3d 38, 248 Cal. Rptr. 217 (1988)). That opinion reversed the trial court judgment in favor of petitioners. The decision was rendered by a panel composed of Justices John T. Racanelli, William A. Newsom and Norman Elkington.

The Court of Appeal found that Kruse and the Jewells had not established by substantial evidence the causes of action alleged in their pleadings. The decision to reverse the judgment was entirely based on established state law principles and did not raise any federal issues or constitutional questions.

Petitioners seek the aid of this Court by legal maneuvers aimed at creating a constitutional question where none in fact exists. Notably, petitioners' briefs contain only a sketchy account of the facts and procedures giving rise to the alleged constitutional questions—perhaps because those facts reveal the frivolous nature of the petitions.

1. Facts Underlying Petitioners' Claims Of Judicial Disqualification.

Petitioners first raised the issue of judicial disqualification *after* the Court of Appeal rendered its decision. While petitioners' motions for rehearing were pending before the Court of Appeal, Kruse filed a motion requesting that Justice Racanelli and Justice Newsom recuse themselves. Kruse claimed that,

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(Footnote Continued)

BA Servicios, S.A., East Kemptville Tin Corporation, and The Electronic Payments Exchange, Inc. Bank of America N.T. & S.A. is itself wholly owned by BankAmerica Corporation, all of the subsidiaries of which are wholly owned.

while the appeal was pending, Justice Racanelli owned Bank stock and Justice Newsom had a "customline" of credit with the Bank. The purported factual basis of those assertions was the belated recollection of Kruse's counsel that at an unrelated hearing involving the Bank in April 1986 Justices Racanelli and Newsom disclosed, respectively, stock ownership in and a loan from the Bank. After Kruse filed her motion for recusal, the Jewells immediately filed their own request based entirely on the declaration filed by Kruse's counsel.

Only days later, Kruse filed an additional brief raising more unsubstantiated accusations. This time Kruse theorized that Winslow Christian, the Bank's Director of Litigation, had recommended Justice Racanelli, Justice Elkington and Justice Newsom to be appointed to the Court of Appeal. Kruse also speculated that Justice Racanelli may have been influenced by a hope that Warren Christopher, the Bank's counsel who argued the appeal, might somehow obtain a federal judicial appointment for the Justice if Governor Dukakis won the presidential election. Appendix A. On June 17, 1988, the Court of Appeal declined petitioners' recusal requests as well as the petitions for rehearing, and the court issued its modified opinion making minor editorial changes.

Kruse and the Jewells then filed petitions for review in the California Supreme Court essentially requesting review of the Justices' refusal to disqualify themselves. Kruse also filed an application to take evidence on the disqualification issue. On June 30, 1988, Justice Racanelli submitted a declaration to the California Supreme Court establishing beyond dispute that he had never owned Bank stock. Appendix B. Obviously, that declaration put to rest the issue of Justice Racanelli's disqualification.[1]

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[1] By statute, a judge's ownership of less than 1% of a party's stock, or of such stock worth less than $1,500, is not a disqualifying interest. California Civil Procedure Code §§ 170.1(a)(3), 170.5(b). Justice Racanelli's Statements of Economic Interest filed pursuant to California Government Code § 87200 for the years 1986 and 1987 do not indicate any ownership of Bank stock. (Under California Government Code § 87203 appellate court judges are annually required to disclose their investments and income during the preceding year. The disclosure is made on "Form 721," the Statement of Economic Interest, issued by the Fair Political Practices Commission under authority of California Government Code § 83113.)

As to Justice Newsom's loan from the Bank, since the 1984 revisions to the California judicial disqualification statutes, a loan is no longer a disqualifying financial interest. California Civil Procedure Code Section 170.1; 2 B. Witkin, California Procedure, *Courts § 80 (3rd ed. 1985).*[2] *See also* Code of Judicial Conduct, Canon 5C(4)(b) (a loan is not a disqualifying interest if obtained in the "regular course of business on the same terms generally available to persons who are not judges"). Since the evidence presented did not establish any ground for disqualification, the California Supreme Court denied petitioners' requests for review, as well as the application to take evidence, finding that petitioners had "not made a prima facie showing of conflict of interest or bias much less a deprivation of due process."

Faced with the absence of any basis in the record for disqualifying Justice Racanelli or Justice Newsom, Kruse now makes entirely new accusations concerning Justice Newsom. In her petition Kruse claims that David Flinn, the Bank's trial attorney in this case, is the family lawyer for Justice Newsom, and that this constitutes ground for disqualification. That again exemplifies petitioners' creation of innuendo without any factual basis.

As a threshold matter, we note that the alleged lawyer/client relationship between Justice Newsom and Flinn constitutes entirely new matter never raised below. Neither Justice Newsom nor the California Supreme Court has had an opportunity to consider that matter. To the extent this Court is inclined to consider it, however, the Bank wishes to correct Kruse's false allegations.

Kruse's conclusion that Flinn was Justice Newsom's attorney is simply not supported by the evidence on which Kruse relies. Her argument springs from two "facts": (1) Justice Newsom's apparent ownership of stock in Squaw Valley Improvement Corporation, as reflected in his 1982 Statement of Economic Interest, and (2) Flinn's representation of that corporation as reflected in its Statement of Domestic Stock Corporation filed with the California Secretary of State in June 1982. Kruse unjustifiably assumes from those two documents

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[2] Although Justice Newsom's Statements of Economic Interest revealing the existence of the creditline were available for inspection at all times, petitioners waited until after the Court of Appeal rendered its decision to raise the disqualification issue.

that Flinn represented the Corporation when Justice Newsom was one of its stockholders.[3] That assumption is wrong. In May of 1982, Justice Newsom, in an arms-length transaction, sold all his shares of Squaw Valley Improvement Corporation to two sisters and a brother. Appendix C.[4] In June of 1982, *after* the sale, Justice Newsom's sisters employed Flinn to dissolve the corporation. It was only after Justice Newsom's sale of shares that Flinn's law firm commenced representation of the corporation. Flinn is not and never has been counsel for Justice Newsom.[5] Appendix C.

2. The Facts Of The Case.

This case arose out of a complex lending relationship between the Bank, the Jewells and the O'Connell Company (of which Kruse was sole shareholder). The litigation commenced in 1981 when the Jewells and the O'Connell Company, faced with financial collapse, filed claims against the Bank alleging fraud, breach of the covenant of good faith and fair dealing and other torts. The California Court of Appeal, applying state law, found that petitioners did not establish at trial their claims of tortious conduct on the part of the Bank.

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[3] Even if Mr. Flinn had been Justice Newsom's lawyer, there would be no ground for disqualification under California Civil Procedure Code § 170.1. *See also Popkin v. Eastern Air Lines, Inc.*, 236 F.Supp. 645 (E.D. Pa. 1964). But if Kruse truly believes these allegations constitute a ground for disqualification, she should have raised that issue first with Justice Newsom himself by seeking to vacate the decision under California Civil Procedure Code § 473. *See Kaufman v. Court of Appeal*, 31 Cal. 3d 933, 184 Cal. Rptr. 302 (1982).

[4] Because the record contains no evidence on this new issue, the Bank proffers in the Appendix David Flinn's declaration explaining his involvement with Squaw Valley Improvement Corporation.

[5] Justice Newsom's name appears in the 1982 Statement of Domestic Corporation filed by Squaw Valley only in the prestamped address placed upon the document by the Secretary of State. Justice Newsom appears as the addressee of the form simply because the Secretary of State records for 1981 showed Justice Newsom's office as the "corporate office." Appendix C.

The complex facts underlying petitioners' original claims against the Bank are irrelevant to this Court's decision on the petitions for certiorari. Those facts raise no federal issues or questions of constitutional dimension. Suffice it to note that Kruse's statement of facts is quite misleading. For an accurate explanation of the underlying facts, this Court can look to the summary contained in the opinion of the California Court of Appeal, attached as Appendix A to Kruse's Petition for Certiorari.

REASONS FOR DENYING THE WRITS

1. The Judgment Below Is Not Final.

Under 28 U.S.C. Section 1257, Supreme Court review of state court decisions is available only with respect to "final judgments or decrees." This Court has often applied the precept that a decision reversing a case and remanding it for further proceedings is "totally wanting in the requisite finality required to support a writ of error from this court." *Cincinnati Street Railway Co. v. Snell,* 179 U.S. 395, 397 (1900). *See also O'Dell v. Espinoza,* 456 U.S. 430 (1982); *Gospel Army v. Los Angeles,* 331 U.S. 543 (1947). Here the Court of Appeal reversed the judgment, and that had the effect of remanding the case to the trial court for further judicial proceedings.[6] Accordingly, petitioners are not seeking review of a "final" judgment or decree.

Petitioners may argue that this Court has granted certiorari to review interlocutory decisions. Those grants, however,

[6] Pending before the trial court is the Bank's motion for immediate entry of judgment, or alternatively for summary judgment. The trial court's disposition of those motions will likely give rise to further proceedings in either the trial or appellate court in California.

represent the exception, not the rule. For review of an interlocutory decision, the case must fall under one of the four exceptions to the finality requirement articulated in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

The petitioners do not even address the finality issue, much less assert any of the *Cohn* exceptions. Both Kruse and the Jewells, however, suggested to the trial court that the fourth *Cohn* exception applies to their situation.[7] That fourth exception permits interlocutory review when, among other things, (1) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" *and* (2) failure to consider the state court decision immediately "might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. at 482-483. Petitioners cannot establish either prerequisite.

Resolution of the questions presented here will not preclude further litigation. Disqualifying the justices who decided the instant case would only have the effect of remanding the case back to the California appellate courts. Moreover, immediate resolution is not required to prevent erosion of federal policy. As this Court stated in *Flynt v. Ohio,* 451 U.S. 619, 622 (1981), in applying the fourth exception, it is important that the "exception [should not] swallow the rule." This case gave rise to no state court opinion at all interpreting federal law which will seriously erode federal policy, much less to such a decision requiring immediate consideration by this Court. Not falling under the fourth or any other *Cohn* exception, petitioners' requests for review should be denied.

2. **Petitioners Did Not Raise The Questions Presented In The State Court Proceedings.**

Petitioners cannot satisfy the requirement that a substantial federal question must have been properly raised in the state court proceeding. *See, e.g., Webb v. Webb,* 451 U.S. 493, 494-

[7] Petitioners obtained a stay of proceedings in the trial court to pursue their petitions for certiorari. The Bank opposed the stay on the ground that this Court was not likely to issue a writ of certiorari because of lack of finality of the decision below. Petitioners filed a reply in which they suggested that the fourth *Cohn* exception applied.

498 (1981); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). The Jewells' Petition for Certiorari in this Court raises for the first time a due process issue under the Fourteenth Amendment. Never during the state court proceedings did the Jewells frame a federal constitutional question. The Jewell's Petition for Review in the California Supreme Court stated the question only as follows: "Should a decision in a landmark lender liability case be allowed to stand when the decision was wrongly decided by two justices who should have disqualified themselves?" Appendix D. As this Court has found, "[a]ll questions of judicial qualification may not involve constitutional validity." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986).

In the court below, the Jewells did not brief or address the due process implications of the alleged disqualification issue. Their failure to do so waived their constitutional claim. *Chambers v. Mississippi*, 410 U.S. 284, 290-291 n.3 (1973); *Beck v. Washington*, 369 U.S. 541, 553, *reh'g denied*, 370 U.S. 965 (1962). Having failed to raise the constitutional issue before the California Supreme Court, the Jewells cannot now seek redress in this Court for any alleged due process violation.[8]

Likewise, Kruse's petition for certiorari raises an issue not presented in the state court proceedings: the alleged (but mistaken) "newly discovered" lawyer/client relationship between Justice Newsom and the Bank's trial counsel. Neither the California Court of Appeal nor the California Supreme Court had an opportunity to consider (much less resolve) the essential factual predicate of the question presented, and so this Court should not review the issue. *See Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 158 n.16 (1970); *Killian v. United*

[8] The Jewells did not overcome this jurisdictional impediment by citing United States Supreme Court cases to the California Supreme Court on the disqualification issue. Such citations do not satisfy the jurisdictional requirement. *See Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. Rptr. 1940, 1948 n.9 (1987). Neither do passing references to "constitutional dimensions" without actually briefing the constitutional point. *See Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980).

States, 368 U.S. 231, 243 (1961), *reh'g denied,* 368 U.S. 979 (1962).

3. **The Case Does Not Present Important Questions of Law.**

Kruse asserts that the case presents a question of first impression: the degree or kind of interest on the part of a judge which violates due process. The mere lack of a Supreme Court ruling on a question has never been recognized as a basis for the grant of certiorari. More importantly, Kruse's characterization of the questions presented as an issue of first impression is misleading.

As the Jewells recognize in their petition, on more than one occasion this Court has explained the relationship between the due process clause of the Fourteenth Amendment and judicial disqualification. In *Tumey v. Ohio,* 273 U.S. 510, 523 (1927), for example, this Court stated:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. [citation omitted] But it certainly violates the Fourteenth Amendment, . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

And more recently in *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 822 (1985), this Court, reaffirming settled principles, explained that:

> [W]hat degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.' [citation omitted.] Nonetheless, a reasonable formulation of the issue is whether the 'situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' [citation omitted].

Kruse also contends that the court should decide the issue of the effect of disqualification of a single appellate justice when

the decision is rendered by a three judge panel. Whether or not this issue is one of first impression, this case is an inappropriate vehicle to review it because Kruse's claims of prejudice are predicated upon unsettled facts never raised below.

4. The Lower Court's Decision Does Not Conflict With Decisions Of This Court.

The Jewells, unlike Kruse, acknowledge that this Court has set forth the due process standards requiring judicial disqualification. They merely claim that the Court of Appeal did not follow those standards when it refused to disqualify Justices Newsom and Racanelli.

The refusal of Justices Newsom and Racanelli to recuse themselves comports with decisions of this Court. Recently this Court rejected the view that "the slightest pecuniary interest" constitutes a violation of the Due Process Clause. *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. at 825-826 n.3. Instead, the Court held that recusal is required where there is "a direct, personal, substantial, pecuniary interest." Applying that principle leads to the inevitable conclusion that Justices Racanelli and Newsom did not violate the due process clause by refusing to disqualify themselves. Justice Racanelli has never owned any Bank stock and Justice Newsom's small creditline does not constitute "a substantial pecuniary interest" so as to cause the judge "not to hold the balance, nice, clear and true." *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. at 822.

The Jewells suggest that the affidavits they filed questioning the justices' qualifications should suffice for recusal regardless of their truthfulness. Contrary to the Jewells' assertion, *Liljeberg v. Health Services Acquisition Corp.*, ____ U.S. ____, 108 S.Ct. 2194 (1988), does not support such a conclusion. In *Liljeberg* the trial judge in fact had a disqualifying interest in the litigation.[9] *Liljeberg,* 108 S.Ct. at 2196, 2203. The rule suggested by the Jewells would result in a clear abuse. Every losing appellant could disqualify appellate justices and vacate

[9] *Liljeberg* is also distinguishable in that it involved interpretation of 28 U.S.C. § 455 and not the due process clause of the Fourteenth Amendment.

an adverse decision by simply filing affidavits questioning the justices' qualifications. Under the rule proposed by the Jewells, the justices would have to recuse themselves regardless of the truthfulness of the allegation. Certainly the Court in *Liljeberg* did not intend to create such an artifice.

5. The Lower Court's Decision Neither Interprets Nor Applies Federal Law On Judicial Disqualification.

Both Kruse and Jewells seek certiorari because the Justices, in refusing to recuse themselves, relied on the California Supreme Court decision in *Kaufman v. Court of Appeal,* 31 Cal. 3d 933, 184 Cal. Rptr. 302 (1982), which, according to petitioners, wrongly interpreted federal law. *Kaufman* rejected the claim that a California appellate justice cannot decide the issue of his own disqualification. Instead, *Kaufman* held that an appellate justice in California should decide individually whether the facts require recusal, and that the higher court only determines whether bias rendered the appellate proceeding unfair.

Contrary to petitioners' position, *Kaufman* neither interprets nor applies federal law; instead, it establishes the California rule (which the court mentioned was comparable to the federal rule). This Court does not grant certiorari to review questions of state law. *See Agins v. City of Tibuoan,* 447 U.S. 255, 260-261 n.6 (1980); *Patterson v. Colorado ex rel. Attorney General,* 205 U.S. 454, 461 (1907).

Petitioners suggest that the *Kaufmān* rule violates due process, but the federal practice is fully consistent with *Kaufman.* Faced with a motion for recusal federal appellate judges individually decide whether disqualification is required. In *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America,* 325 U.S. 897 (1944), Justice Jackson stated that it is "the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances." Justice Jackson noted that the majority of the Court lacked the power to exclude any of its duly commissioned Justices from sitting or voting in any case. Almost thirty years later Justice Rehnquist, when faced with a motion for disqualification, individually decided the disqualification issue.

See Laird v. Tatum, 409 U.S. 824 (1972). In refusing to recuse himself, Justice Rehnquist considered and weighed facts within his own knowledge. Challenged for disqualification, federal circuit judges follow the same procedure. *See, e.g., MacNeil Bros. Co. v. Cohen,* 264 F.2d 186, 189 (1st Cir. 1959); *Martin-Trigona v. Gouletas,* 634 F.2d 354, 355 n.1 (7th Cir.) *cert. denied,* 449 U.S. 1025 (1980).

Petitioners misleadingly rely on cases like *Berger v. United States,* 255 U.S. 22 (1921), *United States v. Sibla,* 624 F.2d 864 (9th Cir. 1980) and *United States v. Gigax,* 605 F.2d 507 (10th Cir. 1979) for the proposition that a judge challenged for bias can only decide the legal sufficiency of the affidavit and not the truthfulness of the allegations. Those cases, however, involved a unique statutory procedure applicable only to trial judges. Under both federal and California law trial judges pass only upon the sufficiency of the affidavit. If the affidavit is sufficient, the judge must refer the matter to another judge for determination of the merits. *See* 28 U.S.C. § 144; Cal. Civil Proc. Code § 170.3.

6. **Alleged Error In The Lower Court's Decision Does Not Justify Review By This Court.**

The Jewells suggest error in the decision below without specifying the nature of the error. Jewell's Petition pp. 15-16. Kruse argues that the Court of Appeal erred by failing to review the case in light of the actual legal theories upon which she relied. Kruse's Petition at pp. 13, 17. Kruse's claim boils down to arguing that the court simply misinterpreted her position. While undoubtedly such a sentiment is shared by most unsuccessful appellants, it certainly does not justify review by this Court. As the Justices of this Court have explained:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions . . . . The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise

> supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.

R. Stern, E. Grossman and S. Shapiro, *Supreme Court Practice* § 4.1, at 190-191 (6th ed. 1986), citing Address of Chief Justice Vinson before American Bar Association, September 7, 1949. *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Petitioners' belief that the court below erroneously applied state law is not a proper ground for certiorari.

CONCLUSION

For all the foregoing reasons, petitioners' requests for certiorari should be denied.

DATED: December 22, 1988

Respectfully submitted,

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APPENDIX

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ril No. A033064/A039161

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

IRENE O'CONNELL KRUSE
Plaintiff, Respondent, and Cross-Appellant,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Defendant, Appellant, and Cross-Respondent.

Appeal from the Judgments of the
Superior Court of the State of California
County of Sonoma
Honorable Laurence K. Sawyer, Judge

PLAINTIFF-RESPONDENT AND CROSS-APPELLANT IRENE O'CONNELL KRUSE'S AMENDMENT TO REQUEST THAT THE JUSTICES OF DIVISION ONE GRANT REHEARING AND RECUSE THEMSELVES, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST

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C. **The Relationship and Long Acquaintance Between the Members of the Court, and Counsel for the Bank, is a Factor to Be Considered on the Issue of Impartiality:**

Martindale-Hubbell discloses that Mr. Warren Christopher, a senior partner of O'Melveny & Myers, who argued the appeals for the Bank, and former Justice Winslow Christian of this Court, were law school classmates at Stanford, and members of the Law Review, graduating together in 1949. In 1959, Mr. Christopher became special counsel to Governor Brown, Sr. From 1964 through 1966, Winslow Christian was the executive secretary to Governor Brown, Sr., and we are informed and believe that in that position Mr. Christian recommended judicial appointments to the Governor, and one of the appointments made in 1964 by Governor Brown was the appointment of Justice Racanelli to the Santa Clara County Superior Court bench.

In 1966, Governor Brown appointed Winslow Christian and Norman Elkington to the Court of Appeal for the First Appellate District, and it is perhaps a reasonable inference that Winslow Christian, as executive secretary, recommended his own appointment, and the appointment of Justice Elkington. It thus appears to be a reasonable inference that both Justice Elkington and Justice Racanelli may have received their appointments to the Court of Appeal and the Santa Clara County Superior Court, respectively, as a result of recommendations by Mr. Winslow Christian.

Justice Racanelli was appointed to the Court of Appeal by Governor Brown, Jr., in 1977, and a year later Justice Newsom was appointed to the Court of Appeal by Governor Brown, Jr., in 1978. We have at this time no information as to whether former Justice Winslow Christian recommended, or played any role in the appointment of, Justices Racanelli and Newsom to the Court of Appeal, but we submit it would not be unreasonable to assume that former Justice Christian may have played some part in recommending the appointments of Justices Racanelli and Newsom to the Court of Appeal, in view of Mr. Christian's former position as executive secretary to Governor Brown, Sr. during which time he may have recommended the appointment of Justice Racanelli to the Superior Court bench in 1964.

In 1984, Justice Christian resigned from the bench, and accepted a position as Director of Litigation in the Office of the General Counsel of the Bank of America, and has maintained his offices in the headquarters of the Bank in San Francisco, since that time. As Director of Litigation of the Bank, Mr. Christian has been in direct charge of this case and these appeals, and it was Mr. Christian who undoubtedly selected his law school classmate Mr. Christopher, and his lawfirm O'Melveny and Myers, to act as appellate counsel for the Bank, in the briefing and argument of these appeals. The selection of Mr. Christopher makes it necessary for this Court to consider certain other facts, concerning political and governmental activity and experience of the members of this Court, and counsel for the Bank, in order to comply with the principle that "a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." (*United Farm Workers, supra*, 170 Cal.App.3d at 104). Those facts to be considered are as follows:

Mr. Christopher, for many years has been, and still is, very prominent and influential in Democratic party political circles, and has held state and federal governmental offices during Democratic administrations. As previously mentioned, he was special counsel to Governor Brown, Sr., in 1959. From 1961-1965, during the Kennedy and Johnson administrations, Mr. Christopher was legal counsel in the office of the Undersecretary of State. He was appointed as a United States Deputy Attorney General in 1967 during the Johnson administration, and served in that position until 1969, resigning then during the Republican Nixon administration. Mr. Christopher was appointed Deputy Secretary of State in 1977, during the Carter administration, and served until 1981, resigning then during the Republican Reagan administration.

Mr. Christopher is a member of the board of directors of First Interstate Bancorp., the parent company of First Interstate Bank. Mr. Christopher was Vice Chairman of Governor Brown Sr.'s commission on the Los Angeles Riots, 1965-1966, during the same time that former Justice Winslow Christian was executive secretary to Governor Brown, Sr. During the Ken-

nedy administration, Mr. Christopher was Chairman of the United States delegation to the U.S.-Japan Cotton Textile Negotiations in 1961, and during that same year attended the Geneva Conference on Cotton Textiles. During the Kennedy-Johnson administrations, Mr. Christopher was special representative of the Secretary of State for Wool Textile meetings, in London, Rome, Tokyo, during the years 1964-1965. From 1975 to 1977, Mr. Christopher was the chairman of the American Bar Association standing committee on the federal judiciary. (The foregoing information appears in the 1987-1988 edition of "Who's Who in American Law," at page 136).

In a reprint of a "Judicial Profile" dated October 6, 1981, originally published in the Los Angeles Daily Journal, and based on an interview with Justice Racanelli, it is stated:

> "... Racanelli's interest in judicial administration seems to be only a continuation of his interest in bar association work and party politics when he was an attorney. While in practice in Santa Clara County, Racanelli sat on the County Bar Association's Board of Directors and the County's Democratic Central Committee."

Further, in this Court's consideration of how Justice Racanelli's participation in these appeals looks to the average person on the street, we submit that there should be taken into consideration the comments of an attorney quoted in the same Judicial Profile, as follows:

> "... If Racanelli has been politically active in judicial administration, a few attorneys also claim he has been political in his decision-making. A deputy attorney general who handles civil work said he is 'much more suspicious of intrusion of political motives in what (Racanelli) does.'..."

Since January of 1981, Justice Racanelli has been the administrative presiding Justice of the Court of Appeal for the First Appellate District, charged with overseeing the operation of the entire appellate court in San Francisco. We submit that the average person on the street might reasonably conclude that it is a somewhat remarkable coincidence that Division One was assigned to handle the appeal in the *Sanchez-Corea v. Bank of*

America, and *In Re the Estate of Barberis* (i.e. *Barberis v. Bank of America*), and Division One was also assigned to handle the present appeals in *Kruse/Jewell v. Bank of America.* We submit the average person on the street might therefore reasonably assume that Justice Racanelli, as the administrative presiding Justice for this Court, may have had something to do with the assignment of those three appeals to Division One. The Bank of course prevailed on all three of those appeals in this Court, based upon an opinion by this Division in *Sanchez-Corea* that was identical, and a carbon copy, of the decision of this Division, on the present appeals, in that both *Sanchez-Corea* and the present appeals, this Division totally ignored the rules of appellate review, and did not view the evidence in the light most favorable to the prevailing party plaintiff that had recovered judgment against the Bank, and instead viewed the evidence in the light most favorable to the respondent Bank, and concluded that the evidence was insufficient to support the judgments against the Bank, and therefore reversed the judgments. In *Sanchez-Corea*, where the plaintiff was fortunate enough to obtain hearing in the Supreme Court, the Supreme Court applied the usual and proper standard and rules of appellate review, and in an opinion that presented a day and night difference and contrast to the opinion of this Division, held that there was abundant substantial evidence to support the judgment for fraud perpetrated upon the borrower-customer plaintiffs, by precisely the same Bank Regional Credit Office head (Timmerman) using precisely the same *modus operandi* as was used against Mrs. Kruse and the Jewells in the present case.

We submit that the average person on the street, aware of the foregoing facts, might reasonably assume that in participating in the decision on the present appeals, Justice Racanelli may have had difficulty putting completely out of his mind, the fact that his past very frequent assignments to sit pro tem on the Supreme Court, which apparently arose from his reputed close friendship with former Chief Justice Rose Bird, may well have ended, and that therefore, if Governor Dukakis is elected president, Mr. Christopher might be influential in obtaining for Justice Racanelli either appointment to the federal bench, or appointment to governmental position and post in a Dukakis administration.

We respectfully emphasize again, that the test to be applied by this Court is not whether in fact there is any such possibility of such events taking place; rather, the much more stringent test to be applied is whether the average person on the street might reasonably think that Justice Racanelli could consciously or subconsciously be influenced to favor the Bank in his decision on the present appeals, and public confidence in the integrity and absolute impartiality of the judiciary demands disqualification, where the average person on the street might entertain a reasonable doubt as to impartiality.

In summary, the three Justices comprising the panel that decided the present appeals, and reversed judgments totalling approximately $22 million against the Bank of America, were Justices Racanelli, Elkington and Newsom. Justices Racanelli and Newsom have in the past announced that they were disqualified to sit on a Bank of America appeal, because of stock ownership and loans. Despite this, it appears reasonable to assume that Justice Racanelli had some hand in the assignment to Division One, of three appeals involving the Bank of America, in all of which the Bank prevailed. Justices Racanelli and Elkington received appointments to the Superior Court and Court of Appeal, respectively, during the time that Mr. Winslow Christian was executive secretary to Governor Brown, Sr.. Mr. Christian was formerly a Justice of this Court, and thus a fellow Justice of Justice Elkington for 12 years, and Justice Racanelli for 7 years, and former Justice Christian has been the Director of Litigation for the Bank of America, handling these cases and appeals and Mr. Christian presumably selected Mr. Christopher and the O'Melveny firm, to act as appellate counsel for the briefing and argument, and Mr. Christopher has such political influence as to possibly be able to obtain appointments to the federal bench or positions in the federal government, for Justices Racanelli and Newsom, and possibly Justice Elkington, if Governor Dukakis is elected President. Lastly, Justices Racanelli and Newsom have failed to disqualify themselves or even to disclose their disqualification, to counsel on these appeals, and Justice Elkington though aware of the said disqualification of his fellow Justices, has failed to cause his colleagues to disclose their disqualification, or to act on his own initiative, to disclose their disqualification.

We submit that the average person on the street, knowing all of the foregoing facts, would entertain a reasonable doubt of the ability of Justices Racanelli, Elkington, and Newsom, to be completely impartial in the decision of these appeals, and that therefore, to avoid even the appearance of impropriety, as well as to comply with the Canons of Judicial Ethics governing disqualification, and to maintain the confidence of the public in the integrity and impartiality of the judiciary, all three Justices are disqualified, and must be considered disqualified.

APPENDIX B

First District
Division One

State of California
Court of Appeal
State Building-Civic Center
San Francisco

John T. Racanelli
Presiding Justice

June 29, 1988

Chief Justice Malcolm M. Lucas
Associate Justices
Supreme Court, State of California
State Building, Civic Center
San Francisco, Ca 94102

Re: Kruse v. Bank of America, S006208

A Motion to Take Evidence has been filed by Petitioner Kruse in conjunction with her pending Petition for Review in the above captioned matter. Said motion is based in part on the declarations of petitioner's counsel and two other declarants relevant to a claim of disqualification based on my alleged ownership of stock in the Bank of America.

I submit the enclosed declaration and attached exhibits with reference to said motion for the court's consideration.

Respectfully,

John T. Racanelli

DECLARATION OF JOHN T. RACANELLI

I, John T. Racanelli declare as follows:

1. I participated as a member of the panel of Division One of the First Appellate District that heard and decided the appeals in Kruse v. Bank of America. (A033064/A039161.)

2. The Petition for Review filed by Irene O'Connell Kruse on June 27, 1988 (S006208) contains allegations essentially similar to those presented to the Court of Appeal in her petition for rehearing that I was disqualified because of an asserted ownership of stock in the Bank of America.

3. In a companion Motion to Take Evidence, petitioner Kruse has submitted declarations from William M. Lukens, Calvin F. Gunn and Dolly Ares attesting that on April 29, 1986, I stated in open court before an argument that I owned stock in the Bank of America.

4. I do not now own, nor have I ever owned, any stock in the Bank of America in any amount whatever. To my knowledge, no other person or entity holds, or has ever held, any stock in the Bank of America in my behalf, either in my name or any other name or designation.

5. My annual Statements of Economic Interests, filed under oath with the Clerk of the Court, First Appellate District, accurately reflect that I do not own and have never owned any Bank of America stock.

6. I have never publicly stated or claimed, either in open court on April 29, 1986, or at any other time and place, that I owned stock in the Bank of America.

7. I presently own, and for some time have owned, a Visa credit card issued in the ordinary course of business by the Bank of America. Prior to the 1984 repeal and replacement of Code of Civil Procedure section 170, it was my usual practice, in proceedings involving the Bank of America as a party, to disclose the debtor-creditor relationship resulting from my periodic use of the Visa card. Though I have no independent recollection of

statements made in connection with oral argument on April 29, 1986, it is likely that—consistent with my past practice— I made a similar disclosure of ownership of a Bank of America Visa card.

8. I have attached the following certified copies of court records for the First Appellate District, Division One:

Certified copies of the minutes of April 29, 1986 and April 30, 1986 (Exhibits A and B, respectively) and certified copies of the computerized docket entries for Johnson v. Daon Corporation (A0279361 and Alexander v. Alexander (A023629) (Exhibits C and D, respectively). Those minutes and computerized docket entries reflect the following:

a) There was no oral argument in Johnson v. Daon Corporation (A027936), the matter for which Gunn attests he appeared and made an oral argument (Exhs. A, C);

b) No action was taken on April 29, 1986, in Alexander v. Alexander (A023629), the matter for which Ares attests she appeared. However, a written request for continuance was filed by Ares on April 30, 1986, and granted by the court that same day (Exhs. B, D).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of June 1988 in San Francisco, California.

_____

John T. Racanelli

EXHIBIT A

San Francisco, April 29, 1986
Division One

COURTROOM PROCEEDINGS

The court met in its courtroom at the State Building, 350 McAllister Street, San Francisco, CA at 9:00 a.m. Present: Racanelli, P.J., Elkington, J., Newsom, J., P. Keeley, Deputy Clerk.

A029660 — People v. Delgado. Cause called and argued by James Kyle Gee for appellant and Gene Kaster for Respondent. Cause ordered submitted.

A027188 — People v. Watkins. Cause called and argued by Deborah Tuttleman for appellant and Ann K. Jensen for respondent. Cause ordered submitted.

A026704 — Wright v. Toomajian. Cause called and argued by Orville L. Wright for appellant and Geoffrey A. Mires for respondent. Cause ordered submitted.

A025332 — Margaret Inda Smyklo v. Alexander Smyklo. Cause called and argued by Alexander Smyklo, appellant in pro per and S. Simone Campbell for respondent. Cause ordered submitted.

A026709 — Frank Barberis v. Bank of America. Cause called and argued by William M. Lukens for appellant and Kristan D. Whitten for respondent. Cause ordered submitted.

At this time Holmdahl, J., joins the bench for the remainder of cases argued.

A026551 — People v. Smith. Cause called and argued by Paul Wolf for appellant and Mark S. Howell for respondent. Cause ordered submitted.

At this time Racanelli, P.J., leaves the bench for the remainder of the cases argued.

A030691 — People v. Carpenter, Jr. Cause called and argued by Catalina Lozano for appellant and Jeff Bryant for respondent. Cause ordered submitted.

A026959 — Sierra Mortgage v. Bi'Anny Corp., Stephen Lopes et al. Cause called and argued by Wade H. Hover for appellant Stephen Lopes. Leo M. Cook, attorney for respondent, did not appear. Cause ordered submitted.

Court adjourned in tribute to the late Justice Murray Draper.

Oral argument having been waived, the following cases are deemed submitted:

A023402 — Rodrigues et al. v. Lewis et al.
A028446 — People v. Slater.
A028289 — Bouzos et al. v. City of Berkeley et al.
A027936 — Johnson et al. v. Daon Corp. et al.
A030075 — Buckenmeyer v. Parmelee et al.

Court recessed until Wednesday, April 30, 1986 at 9:00 a.m.

Minutes of the First Appellate District, microfilm roll 59; printed in Advance Sheet No. 15 (June 3, 1986), pp. 70-71.

EXHIBIT B

San Francisco, April 30, 1986

Division One

A023629 — Mabel G. Alexander v. Richard E. Alexander. The request for continuance of oral argument is granted. The cause heretofore scheduled for hearing on Tuesday, April 29, 1986 at 9:00 a.m. is taken off calendar and rescheduled for hearing on Tuesday, May 27, 1986 at 9:00 a.m. Racanelli, P.J.

A027435/A033676 — George S. Krusi v. Bear, Stearns & Co. The request that same panel hear related appeals is denied.

The request to augment the record is treated as a request to take judicial notice and as such, is granted. Judicial notice will be taken of the transcript of the hearing held March 7, 1984. Elkington, Acting, P.J.

A032599 — Thomas E. Flowers etc. v. San Francisco Residential Rent Stabilization & Arbitration Board; Golden Gateway Center et al., Real Parties in Interest.

A032602 — John L. Farr, etc. v. San Francisco Residential Rent Stabilization and Arbitration Board; Stonestown Properties, Inc. et al. The stipulated motion for consolidation of the above-entitled appeals is granted for purposes of briefing, oral argument and decision in Division One. Racanelli, P.J.

A034789 — In re Helmut August Hanken. The petition for writ of habeas corpus and continuance of bail pending determination of the proceeding is denied. Racanelli, P.J.

A034794 — Joseph Wilfred Boulet v. Superior Court, Alameda County; People, First Appellate District. The petition for writ of prohibition is denied. Racanelli, P.J.

Minutes of the First Appellate District, microfilm roll 59; printed in Advance Sheet No. 15 (June 3, 1986), pp. 74-75.

EXHIBIT C

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

DIVISION: 1

Case No. A027936

TITLE

JOHNSEN, ALBERT C., Et Al.

vs.

DAON CORPORATION, Et Al.

SUPERIOR COURT INFORMATION

County: Santa Clara
Superior Court No.: 483580
Superior Court Judge: H. B. Thompson
Notice of Appeal Date: July 5, 1984

ATTORNEYS—LITIGANTS

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JOHNSEN, ALBERT C. — *Plaintiff-Appellant*

CARROLL, DAVID
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DAON CORPORATION, ETC. — *Defendant-Respondent*

DOCKET ENTRIES

July 11, 1984
Supreme Court Order Filed Transferring Case.

July 11, 1984
Notice of Appeal Lodged/Received.
Fee Paid Attys Gunn and Deyhimy

December 18, 1984
Record On Appeal Filed.
R 3
Under 5.1 Ruling

January 2, 1985
Note:
Kelly of Atty Ruben'S Office Called Re: Not Receiving the Record Due To Incorrect Address of

January 2, 1985
Note:
P.o. Box 5030 When the Correct Address is P.o. Box 5080

January 18, 1985
Filed Letter From:
Richard Ruben Dated 1-2-85 Re His Correct Address.
Atty Screen Has Been Corrected.

January 24, 1985
Apellant'S Appendix and Opening Brief Filed.
2 Volumes of Appendix

March 1, 1985
Respondents Brief Filed.

March 15, 1985
Motion Filed.
To Augment Record From Atty David Carroll of Drummy, Garrett King & Harrison For Resp. daon Corp.

March 15, 1985
Previous Entry Continued.
Tct 4-1-85

April 1, 1985
To Court.
Motion To Augment Record. To Martha (From Resp. Daon Corp.)

April 15, 1985
Case Fully Briefed.
No Arb Received.

May 14, 1985
Order Filed.
Mot. to Augment Record Granted. Record Deemed Aug. To Include A Tx of Proceed. held 8-9-82 and Exh. n

May 14, 1985
Previous Entry Continued.
To Plfs. and Appell. first Amended Complaint Attachd To Motion To Aug. (Jt)

March 28, 1986
Calendar Notice Sent. Calendar Date:
Tuesday, April 29, 1986 At 9:00 a.m. (N,E,H) Pak

April 9, 1986
Request for Oral Argument Filed By:
Atty Carroll For Rspdt Daon Corp. only If Applts Req. oral Argument. (Pak)

April 29, 1986
Argument Waived, Cause Submitted.
Pak

June 26, 1986
Opinion Filed.
Judgment of Trial Ct Dismissing the 1st, 2nd, 3rd And 7th Causes of Applt's Second Amended Complaint

June 26, 1986
Previous Entry Continued.
Is Reversed. The Case Is Remanded To the Trial Ct For Proceedings Consistent With the Views

June 26, 1986
Previous Entry Continued.
Expressed Herein. (See Dissenting Opinion)
Np (Pak)

August 26, 1986
Remittitur Issued.
Jt

CASE DISPOSITION INFORMATION

Disposition Date: June 26, 1986
Disposition: Reversed & Remanded To Trial Court W/Directions.
Opinion Type: Sign Npub
Disposition Final: (Y = Yes — Blank = No) Y
Notation: Newsom J (A) Elkington Apj (C) Holmdahl (D)

JUDGES PANEL INFORMATION

Judge Name: Newsom, William A. (J)
Role: Authoring

Judge Name: Elkington, Norman (J)
Role: Participa
Voted: Concur

Judge Name: Holmdahl, John (J)
Role: Participa

END OF DOCKET CARD INFORMATION

EXHIBIT D

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

DIVISION: 1

Case No. A02369

TITLE

ALEXANDER, MABEL G.
vs.
ALEXANDER, RICHARD E.

SUPERIOR COURT INFORMATION

County: San Francisco
Superior Court No.: 723984
Superior Court Judge: I. H. Grant
Notice of Appeal Date: July 28, 1983

ATTORNEYS—LITIGANTS

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DE HART, GLORIA, Deputy
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San Francisco, CA 94102

ALEXANDER, MABEL G. — *Plaintiff-Respondent*

DOCKET ENTRIES

August 2, 1983
Notice of Appeal Lodged/Received.
Fee Paid Atty Ares

August 31, 1984
Record On Appeal Filed.
C 1 R 1

September 28, 1984
Stipulation of Extension of Time Filed To: †††
Aob To November 1, 1984 Granted.

November 1, 1984
Stipulation of Extension of Time Filed To: †††
Aob To December 1, 1984 Granted.

November 30, 1984
Appellant'S Opening Brief Filed.

January 2, 1985
Stipulation of Extension of Time Filed To: †††
Rb To March 1, 1985 Granted.

March 7, 1985
Respondent Notified Pursuant To Rule 17(B).

April 2, 1985
Respondents Brief Filed.

April 25, 1985
Appellant'S Reply Brief Filed.

April 25, 1985
Case Fully Briefed.

March 28, 1986
Calendar Notice Sent. Calendar Date:
Tuesday, April 29, 1986 At 9:00 a.m. (N, R, E)
Pak

April 3, 1986
Request For Oral Argument Filed By:
Atty Ares For Applt Richard Alexander. (Pak)

April 30, 1986
Filed Letter From:
Req. continuance of Oral Argument From Dolly Ares Office, Atty For Applt. (Pak)

April 30, 1986
Order Filed.
Cont. of Oral Argument Granted. Cont. To Tuesday, May 27, 1986 At 9:00 a.m. (Pak)

May 27, 1986
Cause Argued and Submitted.
Jt

August 20, 1986
Opinion Filed.
The Judgment Is Reversed. Costs Are Awarded To Appellant. Np (Pak)

September 30, 1986
Petition For Review In Supreme Court Received.
A.g. Gloria De Hart.
Jt

September 30, 1986
Petition For Review Filed In Supreme Court.
Pak

November 12, 1986
Petition For Review Denied In Supreme Court.
Respondent. (N, R, E) (Pak)

November 12, 1986
Remittitur Issued.
Pak

CASE DISPOSITION INFORMATION

Disposition Date: August 20, 1986
Disposition: Reversed In Full.
Opinion Type: Sign Npub
Disposition Final: (Y = Yes — Blank = No) Y
Notation: Newsom J (A) Racanelli Pj (C) Elkington J (C)

JUDGES PANEL INFORMATION

Judge Name: Newsom, William A. (J)
Role: Authoring

Judge Name: Racanelli, John T. (Pj)
Role: Participa
Voted: Concur

Judge Name: Elkington, Norman (J)
Role: Participa
Voted: Concur

APPENDIX C

AFFIDAVIT OF DAVID B. FLINN

I, DAVID B. FLINN, under penalty of perjury, declare as follows:

Petitioner IRENE O'CONNELL KRUSE commences her "Statement of the Case" of the Petition for Writ of Certiorari with the statement that the undersigned and his law firm "have long acted as the attorneys on behalf of the family corporation of Justice William A. Newsom, who participated on the panel of three Justices who reversed Petitioner's judgment." That statement is completely untrue. Neither I, nor the law firm of Leland, Parachini, Steinberg, Flinn, Matzger & Melnick, has ever represented Justice Newsom.

In May of 1982 Justice Newsom, in an arm's length negotiated transfer, sold all of his shares of Squaw Valley Improvement Corporation to two sisters and a brother. Prior to the sale, the corporation was represented by Lawrence Silver of the law firm of Feldman, Waldman & Kline of San Francisco. Throughout the entire sale transaction Justice Newsom was represented by Edwin Shiver of San Francisco.

In June of 1982, after the sale, the corporation, then controlled by Justice Newsom's sisters and brother, employed the undersigned and his law firm, Leland, Parachini, Steinberg, Flinn, Matzger & Melnick, to dissolve the corporation and distribute the assets amongst the three shareholders, and *only then* (after Justice Newsom's withdrawal), did the undersigned and his law firm commence representation of the corporation. (The corporation was liquidated and dissolved.)

The form entitled "Statement by Domestic Stock Corporation" attached as Exhibit G to the Petition is a standard California form which is mailed annually by the California Secretary of State to each corporation. The portion at the top which reads "Squaw Valley Improvement Corporation, William A. Newsom, Jr., 350 McAllister Street, San Francisco, CA 94102" is a prestamped address placed upon the form by the Secretary of State from the prior year's filing. Thus, the inclusion of Justice Newsom upon the form is solely as ad-

dressee of the form, since the Secretary of State records from 1981 showed his office as the "corporate office." The new shareholders changed the place of business of the corporation to the office of my law firm, and only the new shareholders acted as officers and directors. Justice Newsom had no further involvement with the corporation and thus neither I, nor my firm, represented the corporation at a time that Justice Newsom was a shareholder.

Dated: December 19, 1988.

DAVID B. FLINN

David B. Flinn

Sworn to and subscribed before me this 19th day of December, 1988.

HELEN D. CARLSON

Notary Public

APPENDIX D

1st Civil Nos.
A0 33064, A0 39161

IN THE
Supreme Court of the State of California

IRENE O'CONNELL KRUSE,

Plaintiff and Respondent,

GEORGE R. JEWELL
and CHARLES DUCK,
Trustee of the Bankruptcy Estate
of GEORGE M. JEWELL
and LAURA E. JEWELL,

Cross-Complainants and Respondents,

v.

BANK OF AMERICA, N.T. & S.A.

Defendant, Cross-Defendant and Appellant.

(Sonoma County
Court No. 112439)

PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE

A. BARRY CAPPELLO
THOMAS G. FOLEY, JR.
FRANCES E. KOMOROSKE
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and Respondents GEORGE R.
JEWELL and CHARLES DUCK,
Trustee of the Bankruptcy
Estate of GEORGE M. JEWELL
and LAURA E. JEWELL

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[1] Page references have been revised to conform to the pagination of this Appendix.

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

George R. Jewell and Charles Duck, trustee of the bankruptcy estate of George M. Jewell and Laura E. Jewell, cross-complainants and respondents (the "Jewells"), respectfully petition for review following the decision of the Court of Appeal, First District, Division One (per Racanelli, P.J.), filed on May 18, 1988 and modified June 17, 1988.

I

INTRODUCTION

The farm credit crisis of the 1980's, brought about in part by questionable practices of agricultural lenders, resulted in the foreclosure of thousands of acres of agricultural land throughout the country. The reaction by Midwestern farmers included murders of bankers and suicides, while California farmers reacted in a more civilized way by resorting to the courts. This case represents the first of those decisions favorable to farmers which has worked its way through the California judicial system.

That journey was abruptly blocked by an appellate court, two of whose justices have direct, undisclosed financial ties to the appellant Bank of America, California's largest agricultural lender. Those ties include the ownership by one justice of Bank of America stock during the pendency of this appeal, a fact admitted by him in open court and corroborated by independent attorneys. It also includes a substantial loan from the Bank of America to another justice which was obtained during the pendency of this appeal, a fact substantiated by the justice's Form 721 Statement of Economic Interests.

The two justices, in disregard of their duty to disqualify themselves to avoid having their impartiality questioned, refused respondents' requests to recuse themselves. In the face of these obvious conflicts, the court instead issued two published opinions which reversed a multi-million dollar jury verdict against the Bank of America in a decision being described by

the commentators as "extraordinary", "highly unusual", and "very surprising". The appearance, if not the fact, is unmistakable: These justices were not impartial. That appearance was later confirmed by the comments of the justices and their staff to the press.

The court's total disregard of traditional standards of appellate review was proof in and of itself of its lack of impartiality. By selectively disregarding evidence, judging witnesses' credibility, crediting the Bank's version of the facts over those supporting the judgments, and otherwise performing the functions of the jury, the appellate court stepped far beyond the bounds of propriety in stretching to reach a decision extremely favorable to a party to whom it had financial ties. This decision provided an immediate benefit to the Bank of America in relieving it of a multi-million dollar judgment; more importantly, it discourages future challenges to the Bank's improper practices.

Conduct such as the appellate court's destroys the public's perception of the independence and integrity of the judiciary, and raises serious questions over its ethics. This Court is therefore respectfully petitioned to grant review to uphold the traditionally high ethical standards of the California courts.

II

ISSUE PRESENTED FOR REVIEW

This case presents one issue for review: Should a decision in a landmark lender liability case be allowed to stand when the decision was wrongly decided by two justices who should have disqualified themselves?

III

STATEMENT OF THE CASE

A. Procedural History.

The Jewells filed these actions against the Bank in 1981; a three-month jury trial began on April 22, 1985. During trial it was discovered the Bank had wilfully suppressed evidence

damaging to its case; that evidence was ordered disclosed. (V.37:3476-87.[1]) After eight days of deliberations, verdicts were rendered on July 19, 1985. (R.A. 152-53.)

The jury awarded the bankruptcy estate of George and Betty Jewell $12.75 million in compensatory damages and $19 million in punitive damages. (R.A. 154.) George R. was awarded $4.5 million in compensatory damages and $1 million in punitive damages. (R.A. 155.) Special interrogatories indicated the jury found in favor of the Jewells for actual fraud, constructive fraud, and bad faith breach based on the denial of the existence of a contract.[2] (R.A. 150-51.)

The Bank moved for judgment notwithstanding the verdict and new trial; the trial court denied the former, but conditionally granted the latter if the Jewells did not consent to a $15 million reduction in the punitive damage awards. (R.A. 343-47.) The Jewells consented to the remittitur, the Bank appealed, and the Jewells cross-appealed. (R.A. 348-50, 351-59, 360-67.)

On May 18, 1988, the Court of Appeal filed its initial opinion, certified for publication, which overturned the Jewells' judgments. That opinion ignored virtually all rules of appellate review and was seemingly motivated by a desire to reach a decision favorable to the Bank. The linchpin to the Jewells' case, their fiduciary relationship with the Bank, was totally disregarded, as was the substantial evidence supporting the jury's findings that the Bank had committed three separate torts in ten distinct instances over a four-year period. In response to these and many other factual and legal errors, the Jewells filed a petition for rehearing on June 2, 1988.

On June 11, 1988, the Jewells for the first time learned from counsel for respondent Mrs. Kruse that Presiding Justice Racanelli had stated on April 29, 1986 at oral argument of an

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[1] Excerpts from the reporter's transcript are cited by volume and page number; "R.A." is respondent's appendix.

[2] The basis for these findings was a series of acts by the Bank over a four-year period which constituted actual and constructive fraud in 1976; actual and constructive fraud in 1977; actual fraud, constructive fraud, and bad faith breach of contract in 1978-79; and actual fraud, constructive fraud, and bad faith breach of contract in 1980.

unrelated Bank of America case that he owned stock in the Bank of America. (Ex. A. at p.2.) It was also then learned that Justice Newsom had paid off or otherwise discharged loans to the Bank of America and then negotiated for and obtained a new custom line of credit from the Bank in excess of $10,000 in 1987 while this appeal was pending. (*Id.* at pp. 8, 11, 14, 17.) An investigation was begun, and a request made that the two justices disqualify themselves and grant rehearing if Mr. Lukens' allegations were true.

The response of the justices, their staff attorneys, and the Bank to these serious charges of impropriety was highly troubling. In the media, Justice Racanelli enigmatically stated to *The Recorder* in an article published June 15, 1988 that he had "no reportable stocks or bonds" in the Bank of America, implying he owned *some* interest. (Ex. B.) Justice Newsom declined all comment. (*Ibid.*)

The court's attorneys *did* comment; one stated that Justice Racanelli "has never owned Bank of America stock," and claimed that "Mr. Lukens misunderstood what was said or misrecollected" the events of April, 1986. (*Ibid.*) However, two independent attorneys present at the April, 1986 oral argument have corroborated Mr. Lukens' statement that the two justices did in fact admit to their financial ties to the Bank of America. (Exs. C and D.)

The principal court attorney for the First District was quoted in *The Recorder* article as stating that Justice Racanelli did not learn that this appeal was assigned to his panel until February, 1987, and that:

> "If he owned stock, he obviously would have disqualified himself. Judges recuse themselves for the slightest of reasons. Even the appearance of impropriety. I am sure there was none of that here." (Ex. B.)

That is not true; as the docket sheet from Division One, District One indicates, this case was before this panel on October 24, 1985. (Ex. E.) One December 4, 1985, this panel sent Mr. Lukens a notice regarding his filing fee (Ex. F), and on July 22, 1986, Justice Racanelli himself granted the Bank of America an extension to file its opening brief. (Ex. G.)

The day after *The Recorder* article, the requests for disqualification were denied along with the petitions for rehearing. A new, modified opinion with over 100 changes was issued; it was also certified for publication despite the fact that it, like the prior opinion, failed to meet the requirements of California Rule of Court 976(b). (App. A.)

B. Statement of Facts

The Jewells jointly owned and operated a highly successful business in Sebastopol which grew, brokered, transported, and packed apples.[3] (R.A. 419, 891; V.25:4202.) The Jewells had been customers of the Bank of America since the late 1930s, and they developed a close friendship with Bill Sullivan, the local branch manager. (V.9:1911, V.10:2250-34, V.24:4166, 4200-1b.)

The Jewells were unsophisticated in financial matters and relied extensively on Sullivan for advice and guidance in that area. (V.10:2250-88, V.24:4200-1b, 4200-2, 4200-5.) The Jewells believed Sullivan to *be* the Bank of America, and whatever he told them, they "banked on." (V.11:2335, V.24:4200-4, 4200-5, V.25:4211, 4216.)

The Bank first exploited this fiduciary relationship in 1976 when it induced the Jewells to borrow $150,000 from the Bank to save the James E. O'Connell Company ("O'Connell") from an impending foreclosure sale which would have exhausted the Bank's security for its loans to O'Connell. (R.A. 556, 565; V.16:3154-56, V.25:4217-18, 4225.) Sullivan failed to disclose to the Jewells the severe financial problems O'Connell was facing and the fact the Bank would not loan any more money to it. (R.A. 542; V.11:2283, 2290-92, V.15:2987-88, V.25:4218.) This intentional concealment was documented by an internal memo by Sullivan. (R.A. 824.)

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[3] These facts are necessarily severely abridged because of space limitations; a more detailed rendition is located in the Jewells' Respondents' Brief filed April 3, 1987.

Months later O'Connell faced another financial crisis and the Jewells loaned it another $114,000 which they borrowed from the Bank, still operating under the assumption that Sullivan would advise them if they should not do so. (R.A. 504-13; V.25:4237-39, V.26:4440-41.) The two loans caused a severe strain to the Jewells' working capital, a fact reflected in internal Bank documents which questioned the Jewells' ability to repay the Bank. (R.A. 548-55, 557, 565; V.11:2315-19, 2323, V.25:4232-34.)

Despite this knowledge, Sullivan's superiors at the Bank decided to induce the Jewells to borrow from the Bank to pay off O'Connell's delinquent loans to the Bank, a fact documented in its internal memos. (R.A. 565, 573.) When George questioned why the Bank wanted him to pay off O'Connell's delinquent loans, Sullivan said his superiors at Regional Credit Administration ("Regional") had asked that George do this, but that if any problems arose because of it, the Bank would work with the Jewells to solve them. (V.12:2541; V.25:4235-37.)

The promised assistance included a long-term loan to consolidate the Jewells' short-term debt; the Jewells promised not to encumber their ranch so it would be available as security for that loan. (V.10:2069-70, V.11:2376, V.12:2426, V.13:2641-44, V.25:4236-37, 4277-79, V.26:4346.) The Jewells believed that by doing as their friend Sullivan asked, Sullivan was committing to help them; based on this belief, the Jewells borrowed $150,000 *from* the Bank and gave it *to* the Bank to pay off O'Connell's delinquent loans. (R.A. 577, 578; V.11:2372-76; V.25:4236-37.)

The Jewells' financial condition quickly degenerated as a result of their "favor" to Sullivan, a fact reflected in the Bank's documents. (R.A. 573, 658, 891.) The burden imposed by their large loans to O'Connell prevented them from paying back from their own operations the funds they had borrowed from the Bank for O'Connell. (V.11:2350-51; V.25:4235-37; V.33:5805-07, 5812-13.) This set in motion a spiral of debt which forced the Jewells to borrow more funds from the Bank for O'Connell in the futile hope O'Connell could thereby recover and repay the Jewells. (V.12:2446, V.25:4242-43, 4250, V.26:4454.)

When it became necessary to construct a new dehydrator for the O'Connell plant, Sullivan agreed to make a $1 million long-term loan to be secured by the new plant. (R.A. 659; V.25:4250-52, V.26:4346.) This agreement was evidenced by Betty's notes from a meeting with Sullivan, which were found in his files. (R.A. 659; V.25:4250-52, V.37:6581-82.) As a result of discussions with Sullivan at this meeting, the Jewells believed the Bank would make a long-term loan on the O'Connell plant or, if necessary, the Bank would make a long-term loan directly to the Jewells secured by their ranch. (V.12:2508-10, V:25:4250-52, 4277-79, V.26:4346.)

Sullivan later informed George that the Bank would not fund the O'Connell project if Dan O'Connell managed it. (V.25:4248-49, 4253-54; V.26:4370-71.) George refused to remove Dan O'Connell from his own family's business and instead went to the Bank's main competitor, the Production Credit Association ("PCA"), for financing. (V.25:4254.) Sullivan soon lured the Jewells back with statements that Regional regretted its refusal to loan them the funds. (V.25:4258, V.26:4391.)

Regional was actually motivated by its concern that the PCA might get a security interest in the Jewell's ranch, but to the Jewells, Sullivan's statements meant the Bank would fund the O'Connell plant. (R.A. 599; V.10:2069-70, V.12:2474-75, V.25:4259.) The Bank made a $209,000 equipment loan to the Jewells for that plant; in exchange it asked the Jewells for deeds of trust on their property. (R.A. 606-17; V.12:2480-81, V.25:4259.) The Jewells resisted encumbering their own property for O'Connell since they "did not owe the industry that much." (V.25:4259-60.)

The fact that the Bank made an equipment loan on a project indicated to the Bank's assistant manager that the Bank would make a long-term loan on that project. (R.A. 606-17; V.20:3600-09, 3600-10.) A Bank vice-president also testified it would be unusual for the Bank to make an equipment loan for a project without providing a long-term loan. (V.23:3977-78.) In addition, it was standard Bank practice to loan funds for major construction projects only after permanent financing had been arranged. (V.21:3641, 3701, V.23:3959-60, 4047,

V.30:5141.) The Bank knew that the funds it was advancing the Jewells were being used for O'Connell; this also implied the long-term loan was forthcoming. (R.A. 644-46, 655-56, 712-30, V.23:4049-50/1b, V.34:5864-66, 5878-79.)

Sullivan's practice of advancing construction funds on the basis of oral assurances that long-term loans would eventually be approved was repeated by him on at least two other projects: The $17.7 million Sebastopol Cooperative Cannery ("Co-op") and the $900,000 "Fresh Pack" plant which George R. built for packing and storing high quality apples. (R.A. 461, 862-71; V.7:1423, V.9:1990, V.13:2741, V.19:3303-07, V.32:5553, V.25:4265.) This was an unorthodox way of financing major construction projects, yet Sullivan routinely followed it and even advanced sums which exceeded his lending limit. (R.A. 634-43, 647, 862-71; V.13:2754-56, V.14:2777, 2782-86, V.20:3600/9-10, V.22:3858.) The Co-op and Fresh Pack plants eventually got the long-term loans promised by Sullivan. (V.9:1964-65, V.32:5553.)

As the O'Connell project advanced, various representatives of the Bank repeatedly visited the site and offered nothing but encouragement to the Jewells. (R.A. 454; V.32:5526-27.) Sullivan's support was unflagging, and his superior Norm Jensen also expressed his enthusiasm to the Jewells. (V.9:1985-88, V.12:2526-28, V.23:4051/14, V.25:4248, 4263, .4265, 4281-83, V.26:4455-56, 4500/7, V.32:5519, 5525-27, V.36:6418-19.) No one from the Bank ever said or did anything which discouraged the Jewells from going forward with the project or which indicated that the long-term loan might not be approved. (V.4263, 4265-66). As a result, the Jewells believed that "further up in the Bank everything was in accord." (V.25:4282-83, V.26:4500/7.)

This belief was not unreasonable; the Bank's own policy manual prohibited "entering into detailed discussions or negotiations with customers regarding complex, controversial, or unusual transactions" without prior approval by Regional. (R.A. 887.) The manual also directed the Bank's employees to "[e]xercise care in such discussions to ensure that the customer does not interpret the discussions as a commitment." (*Ibid.*)

Internal Bank documents evidenced the Bank's intent to make the loan, as well as the fact the Jewells were relying on the loan to help them repay the debt they were incurring on the O'Connell project. (R.A. 437, 454, 631, 644, 645, 648-49, 813; V.9:1987-88, V.10:2250/27, V.12:2511-12, 2527). Other documents indicate Regional knew Sullivan was advancing large sums to the Jewells for the O'Connell project and that these could only have been repaid with a long-term loan. (R.A. 404-05, 589-91, 606-17, 631, 632-33, V.9:1797, V.23:3989.)

Despite this knowledge, the long-term loan was denied on the pretense the O'Connell plant was "special purpose" and the Bank loaned funds only for multi-purpose buildings. (R.A. 424; V.22:3773, 13878-79.) The plant was in fact multi-purpose; in addition, the Jewells' Fresh Pack plant, which *did* obtain a long-term loan, *was* a special-purpose building. (R.A. 424, 663; V.9:1791, V.22:3878-79.)

Sullivan argued these points to Regional in an impassioned memo, criticizing the Bank for disregarding its own policies and for failing to tell him it would not approve the O'Connell loan. (R.A. 438-40, 652-54; V.13:2656-57.) Unable to change Regional's mind, Sullivan abruptly and permanently left the Bank. (R.A. 677-78; V.13:2615-16, 2656-57, 2660.)

Sullivan was replaced as branch manager by Roger "Rocky" Bunch, whose self-proclaimed mission from his first day in Sebastopol was to get deeds of trust on the Jewells' ranch. (V.17:3171/90-92, 3171/95-96, 3171/99, V.30:5255, V.45:8056-57.) From that day on, Bunch resorted to every conceivable means to entice, persuade, humiliate, or frighten the Jewells into turning the deeds over to him. (V.26:4330, V.30:5193-94, V.30:5248-50, V.37:6589-90.) Bunch's "job and duty to the Bank [was] to try to get deeds of trust from any source I can if I possibly can" since "anything that George controlled, it would be [my] job to try to get that for the bank." (V.18:3300/10.)

On October 30, 1979, an application for a $1.9 million long-term loan for the O'Connell plant was submitted which specified all the terms and conditions of the long-term loan Sullivan had been promising the Jewells; these included a 20-year term, 12 percent interest, and the O'Connell plant as

security. (R.A. 669-75.) The application also noted that the Jewells had borrowed $1.3 million from the Bank to construct the plant in reliance on the fact the Bank would finance it. (R.A. 673.) No one from the Bank would take responsibility for the application. (V.17:3171/55-56, V.20:3600/19, V.31:5395-98.)

Bunch's mission to get the Jewells' deeds of trust became an obsession; virtually every time the Jewells met with Bunch, he asked for them. (R.A. 695; V.17:3171/101, 3171/95-96, 3171/106-107.) The Jewells refused, since Bunch never agreed to the long-term loan which Sullivan had promised and on which the Jewells had substantially relied. (V.17:3171/97, V.25:4294, V.26:4336.) The Jewells were, however, fully prepared to give the Bank the deeds of trust if it honored its promise to give them the long-term loan on their own ranch which they desperately needed, but the Bank did not. (V.17:3171/136, V.25:4294-95, V.26:4470.)

Bunch's determination paid off; in the summer of 1980, he announced to the Jewells the Bank would loan them no more money, but offered to assist them with a plan to liquidate their assets under the Bank's supervision. (V.25:4299, V.30:5248-50.) The proceeds were to go to the Bank, which would first pay the 100 apple growers who had sold apples to the Jewells and who were at that point the Jewells' greatest concern, then the PCA, and, lastly, itself. (V.30:5191, 5198-99, 5248.) The Jewells reluctantly agreed to the plan, after months of threats, humiliation, and intimidation, which culminated in George's emotional collapse at a joint Bank-PCA meeting. (V.26:4326-27, V.29:4970, V.30:5193-94, V.32:5561, V.37:6589:90.)

In reliance on Bunch's assurances of assistance, the Jewells turned over everything they owned to the Bank. V.26:4328, 4336, V.30:5242, 5250-51, 5264-66, V.32:5562, V.37:6591.) The Bank kept virtually all the proceeds of the sales of the Jewells' properties, as well as their deeds of trust. (V.26:4332, V.29:5016, V.30:5262-63, V.31:5339.)

After three years of litigation, thousands of dollars of attorneys' fees, and an order from the Bankruptcy Court, the Bank was forced to return the proceeds and deeds of trust to the Jewells. (V.29:5014, V.31:5370, V.37:6524-25.) It was undis-

puted the Jewells would never have given their deeds of trust if they had known the Bank would not honor its commitment to pay their growers and the PCA, a fact the Bank conceded. (V.26:4334, 4338; V.30:5264-65, V.37:6591-92.)

As soon as the PCA learned the Bank had "double-crossed" it by taking the Jewells' deeds of trust, the PCA moved against the Jewells. (R.A. 457, 803, 805; V.29:5001-5005, 5019-5020, V.34:5997-98.) George told Dan O'Connell, and the O'Connells filed a lawsuit to prevent the Bank from forcing the Jewells to foreclose on the O'Connell property. (V.24:4099; V.26:4338; V.29:5050-52.) George and Betty then filed a voluntary bankruptcy petition, their son followed them several months later and the 100 apple growers are still waiting, eight years later, to be paid. (R.A. 805; V.30:5123, V.31:5475/19, V.32:5573.)

IV

THE OPINION WAS WRONGLY DECIDED BY TWO JUSTICES WHOSE DIRECT FINANCIAL TIES TO THE APPELLANT BANK OF AMERICA MANDATED THEY BE DISQUALIFIED

A. Presiding Justice Racanelli Owned Stock in the Bank of America During the Pendency of this Appeal and Failed to Disclose It.

California Rule of Court 29(a)(3) mandates review of a decision of an appellate court "where, because of disqualification or other reason, the decision of the court of appeal lacks the concurrence of the required majority of qualified justices." At least one and perhaps two of the three justices who issued the opinion should have disqualified themselves from hearing this appeal. As a result, their decision is necessarily void, and review should be ordered. (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 190.)

What evidence there is on Justice Racanelli's stock ownership in the Bank of America would lead a reasonable person to conclude he should have disqualified himself from hearing

this case. At the same time this appeal was pending before District One, Division One, Justice Racanelli owned, by his admission in 1986, *some* stock in the Bank of America.

Whether Justice Racanelli still owns stock in the Bank has not been answered satisfactorily; he merely stated on June 15, 1988 he had no *reportable* interest. (Ex. B.) According to Government Code section 82034, an interest which is less than $1,000 need not be reported. Despite this, California Code of Judicial Conduct Canon 3 requires disqualification if a judge has *any* financial interest in a party. As a result, Justice Racanelli should have disqualified himself, even if his interest did not have to be reported on his Form 721.

It is no defense that Justice Racanelli has since disposed of his Bank of America stock, if that is in fact what occurred. Almost 100 years ago, this Court decided another case in which a judge owned stock in a bank which was a party to a lawsuit, yet believed he was not disqualified because he had disposed of the stock. (*Adams v. Minor* (1898) 121 Cal. 372.) This Court responded:

> We do not think that the belief of the judge one way or the other would change the fact of his disqualification. He might honestly believe and hold that he was qualified, but that would not qualify him any more than he could acquire jurisdiction by deciding that he had it. Nor do we think that removing the cause of disqualification after the case was submitted to him for decision would operate to remove the qualification. The code says if he is interested no "justice, judge, etc. . . . shall sit or act as such." This does not mean that he may hear the evidence in a case in which he is interested and may decide it, after sitting and acting in it, provided he remove the cause of disqualification before he enters judgment. As we all know, the decision of questions arising during the course of the trial often determines the final judgment itself. The statute must be held to mean what it says, and it is that he shall not sit or act as judge in an action in which he is interested. (*Id.* at 375; accord. *Moody v. Shuffleton* (1928) 203 Cal. 100, 103-05.)

Disqualification rules are strictly interpreted; they mandate disqualification of judges *who do not even know of the facts which create the appearance of impropriety.* Less than two weeks ago, the U.S. Supreme Court decided the landmark decision of *Liljeberg v. Health Services Acquisition Corp.* (June 17, 1988) ____ U.S. ____ 88 Daily Journal D.A.R. 7756, in which it vacated a final order by a District Court judge because of the judge's *possible* conflict of interest, even though the judge was *unaware* of the conflict.

The Supreme Court based its decision on 28 U.S.C. § 455(a)[4]; it, like California Code of Judicial Conduct Canon 3, is based on ABA Code of Judicial Conduct Canon 3. The statute's violation is established when "a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge" of the facts which create the appearance of partiality; in that situation the judge's "impartiality might reasonably be questioned." (*Liljeberg, supra* at 7759.)

The Supreme Court noted that the purpose of section 455(a) is to "promote public confidence in the integrity of the judicial process"; it is therefore irrelevant "whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." While the risk of injustice to the parties should be considered, much more significant is "the risk of undermining the public confidence in the judicial process." (*Id.* at 7760.) The Court cautioned that it "must continuously [be borne] in mind that to perform its highest function in the best way 'justice must satisfy the appearance of justice.'" (*Ibid.*, quoting *In Re Murchison* (1955) 349 U.S. 133, 136, 75 S.Ct. 623, 625.)

In weighing whether the drastic sanction of vacating a final order on which the parties have relied should be imposed, the Supreme Court found that doing so would prevent "a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." (*Id.* at 7761.) The Court concluded that in all cases, the

[4] It provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

"guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." (*Ibid.*, quoting *Public Utilities Commission v. Pollak* (1952) 343 U.S. 451, 466-67, 72 S.Ct. 813, 823; accord, *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 823, 106 S.Ct. 1580, 1580.)

California Code of Judicial Conduct Canon 3, like 28 U.S.C. §455(a), requires judges to disqualify themselves in any proceeding in which "their impartiality might reasonably be questioned." Despite this clear mandate and in complete disregard of the public's perception of their action, Justices Racanelli and Newsom refused to disqualify themselves, apparently in reliance on *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 939-40. (App. A.)

Neither *Kaufman* nor any other California case, statute, rule, or canon authorizes that action. *Kaufman* held that California follows the Federal rule in allowing a challenged justice to decide whether he sould disqualify himself, but that decision is obviously reviewable by this Court. It is also reviewable by the U.S. Supreme Court since the issue has Constitutional dimensions. (*Aetna Life Insurance Co. v. Lavoie, supra* at 825, 1587, quoting *in Re Murchison* (1955) *supra* at 136, 625; see also, *Ward v. Village of Monroeville Ohio,* (1972) 409 U.S. 57, 60, 93 S.Ct. 80, 83).

Whatever interests Justices Racanelli and Newsom had in the Bank of America should have been disclosed to allow the parties and their counsel the choice of proceeding with that panel. This Court demands no less of itself; those justices who are shareholders in the Bank of America routinely disqualify themselves from considering cases involving the Bank of America. (Ex. H).

The same is true of the Federal courts; U.S. District Court Judge William A. Ingram, who unknowingly and indirectly owned $80 worth of stock of Intel, but later disposed of it, recently disqualified himself from deciding the landmark computer copyright case of *NEC Corp. v. Intel Corp.* (Ex. I.) However, Judge Ingram did so only after he had earlier refused to disqualify himself, which prompte a request by NEC to the

Ninth Circuit Court of Appeal to intervene; at that point Judge Ingram disqualified himself and vacated all his rulings in the case.

Certainly the public deserves no less from Division One, District One, and especially from its Presiding Justice, the former chair and a current member of the Commission on Judicial Performance. The preservation of the integrity and independence of the judiciary demands adherence to the highest ideals of both personal and official conduct. (Preamble, California Code of Judicial Conduct.) Public perceptions of justice are hardly furthered when justices who are reasonably thought to be biased by virtue of financial ties to a party decide in a case, particularly Case as far-reaching and significant as this. (*Lindsay-Strathmore Irrigation District v. Superior Court* (1920) 182 Cal. 315, 334; *Tatum v. Southern Pacific Co.* (1967) 250 Cal.App.2d 40, 42.)

B. Justice Newsom Negotiated and Obtained a Substantial New Loan from the Bank of America While this Appeal Was Pending.

It appears from Justice Newsom's Form 721 that he had a car loan from the Bank of America during 1985 and two other small unsecured loans from the Bank in 1986 and 1987 which were each paid off in those years. (Ex. A at pp. 8, 11, 14.) Justice Newsom apparently thereafter negotiated and obtained, sometime between January and December, 1987, a substantial, new, unsecured "Customline credit" loan from the Bank in an amount in excess of $10,000. (*Id.* at p. 17.) Justice Newsom held this loan as of February 29, 1988; he heard oral argument in this case on February 25, 1988. (*Id.* at p. 16.)

The Bank claims that its loan to Justice Newsom is "virtually indistinguishable from a credit card charge account". (Bank's Opposition to Petition for Disqualification, p. 9, fn. 2.) It is submitted that it could appear to a reasonable person highly unusual for a person with an income of that of an associate appellate court justice to have a credit card from the Bank of America with a limit in excess of $10,000. Whether such a credit arrangement is in fact "a loan from a lending

institution in its regular course of business on the same terms generally available to persons who are not judges", as authorized by Canon 5C (4)(b), is a matter which cannot be determined by virtue of Justice Newsom's refusal to comment.

However, even if the loan were technically permitted by Canon 5C (4)(b), its propriety must still be weighed against the admonition in the Commentary to Canon 5C which states that judges should "refrain from engaging in business and from financial activities that might interfere with the impartial performance of their judicial duties." It must also be weighed against the paramount concerns of Canon 3C, which requires judges to disqualify themselves *in any proceeding in which their impartiality might reasonably be questioned.* It is submitted that a reasonable person would find it highly unseemly that a judge who had the power to decide a major case which substantially affected the financial interests of a lender was negotiating with that lender to obtain a large, unsecured loan while the case was pending before him.

In any event, if Justice Newsom felt his old loans were significant enough to disclose it at the April, 1986 oral argument of a minor Bank of America case, then certainly it would have been more important to disclose his new, increased loan in this landmark decision. His failure to even mention it in this proceeding raises serious doubts about his impartiality and leaves the public with the distinct impression that perhaps justice is not blind.

C. The Bias of the Court is Evident From The Opinion's Intentional Rejection of Established Principles of Appellate Review.

The decision in this case was, to say the least, shocking. Lenders' counsel and the commentators were as surprised as the parties and their counsel that an appellate court would reverse jury verdicts and a new trial order on the basis on an alleged lack of substantial evidence. William Burke, bank counsel and authority in lender liability, described the decision as "highly unusual." (Ex. J.) Professor Schecter of Loyola Law School, another authority in the field, described it as "very surprising" since "the appellate court is in essence saying that

no reasonable jury could have come to the conclusion that this jury came to. This is extraordinary."[5] (*Ibid.*)

Reversals based on a lack of substantial evidence are rare; this is so because of the well-established rules which presume the judgment to be correct, prevent reviewing courts from weighing evidence and re-examining questions of fact, and require that the evidence and the inferences based thereon be viewed in the light most favorable to the prevailing party. All of these rules were completely disregarded, along with both substantial evidence and legal authority which supported the verdicts. No rational explanation exists for this result, other than a lack of impartiality by the court which rendered the decision.

1. **The Opinion Refused to Consider the Existence of the Fiduciary Relationship Between the Jewells and the Bank.**

The Opinion cavalierly dismissed what was probably the most central issue in the case: The Bank's exploitation of its admitted fiduciary relationship with the Jewells.[6] (App. A at 17.) Had it not done so, it would have been compelled to find in favor of the Jewells for three reasons.

First, there is no question that the Bank had a duty to disclose facts to the Jewells which it failed to disclose and that it took undue advantage of the Jewells by using them "as tools with which to alleviate the results of its own prior poor loan judgment" by paying off O'Connell's delinquent loans. (*First National Bank in Lenox v. Brown* (Iowa 1970) 181 N.W.2d 178, 184.) That shifted the burden of proof to the Bank to prove its good faith and lack of undue influence, a burden the Bank never met; it also constituted constructive fraud. (*Estate of Sanders* (1985) 40 Cal.3d 607, 616.)

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[5] Almost as surprising was the modified opinion which omitted some issues which had been raised *sua sponte* by the court, changed substantially the court's interpretation of the facts, and substituted new legal authority for old. Despite these concessions that the original opinion was both factually and legally erroneous, the ultimate decision to reverse remained unchanged.

[6] The opinion ignored both the facts and the law on fiduciary relationships, including cases such as *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, in which the Bank of America was found liable for acts strikingly similar to those of this case.

Second, the existence of the fiduciary relationship required the Jewells' reliance to be measured by a different standard than that used in the opinion. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 382.) As discussed *infra*, the Jewells met the correct standard.

Third, since the judgment was based on the three separate torts of actual fraud, constructive fraud, and bad faith breach, it had to be affirmed if any *one* of the three was supported by substantial evidence and unaffected by error. (*Khanna v. Microdata Corporation* (1985) 170 Cal.App.3d 250, 258.) The constructive fraud claim was fully supported both legally and factually; thus, the judgments should have been affirmed.

2. The Opinion Ignored the Substantial Evidence of the Long-Term Loan Commitment and The Bank's Breaches.

The opinion claims the parties never got beyond the negotiating stage, and that therefore no contract ever arose. (App. at 28-31.) While this issue was never raised at trial and there was necessarily no evidence on it, what *was* proven at trial clearly disproves it.

First, it is only when the evidence *clearly shows* an agreement is subject to further negotiations that it will not be enforced on the basis the parties were merely negotiating. (*Corbin on Contracts* (1963) §95, pp. 397, 401-02.) There was no such evidence.

Second, the fact that one party to the agreement begins performance with the knowledge of the other proves the contract was consummated. (*Id.* at 407.) Here, the Jewells did everything the Bank asked of them and substantially relied on the fact the Bank would perform.[7]

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[7] For this reason, the Jewells have consistently argued that it will be an idle act to reverse the judgments since the Jewells can prevail at retrial on the alternative theories of implied contract and estoppel. (*Isthmian Lines, Inc. v. Schirmer Stevedoring, Co.* (1967) 255 Cal.App.2d 607, 610.) The modified opinion concedes this point. (App. A at former fn. 14, p.29.)

The opinion also claims there was a lack of substantial evidence of the loan commitment, yet that evidence was overwhelming.[8] Many recent decisions have upheld oral loan commitments on evidence much less substantial than this.[9] There was thus no basis in the law or the facts for the opinion to conclude no commitment was made.

Similarly, there was absolutely no basis for the opinion to find no breach by the Bank of that commitment. The opinion's basis for this finding was the Jewells' alleged refusal to pledge their ranch as security for a long-term loan. However, the evidence was undisputed that the Jewells were fully prepared to do so as soon as the Bank gave them the long-promised, long-term loan, yet the Bank never did so.

Finally, the opinion includes the incredible statement that the Bank's conduct in refusing to return the sales proceeds from the Jewells' property, along with their deeds of trust, was not a breach.[10] (App. A at 31-33.) It is beyond comprehension how a court could state in a published opinion that when a party

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[8] For example, the visits by Sullivan's superiors, the Bank documents discussing the commitment, the loan application itself, the parties' course of dealing, the evidence relating to similar funding of the Co-op and the Jewells' Fresh Pack plants, Betty Jewell's notes from the December, 1978 meeting, and the Bank's practice of not advancing funds for construction projects in the absence of a long-term commitment all supported the Jewells' statements that a commitment had been made.

[9] See, *Landes Construction Co., Inc. v. Royal Bank of Canada* (9th Cir. 1987) 833 F.2d 1365; *National Farmers' Organization v. Kingsley Bank* (10th Cir. 1984) 731 F.2d 1464; *Coastland Corp. v. Third National Mortgage Co.* (4th Cir. 1979) 611 F.2d 969; *Crystal Springs Trout Co. v. First State Bank of Froid* (Mont. 1987) 732 P.2d 819; *Wait v. First Midwest Bank/Danville* (Ill.App. 1986) 491 N.E.2d 795; *K-Line Builders, Inc. v. First Federal Savings & Loan Ass'n* (Ariz.App. 1983) 677 P.2d 1317; *Bixler v. First National Bank of Oregon* (Ore.App. 1980) 619 P.2d 895.

[10] In stretching to reach this conclusion, the opinion had to consider, and resolve, highly technical bankruptcy issues which had never come up at trial and on which there was no evidence. (App. A at 32-33.); by doing so, the opinion erred both legally and factually, and violated Government Code §68081. (See, *Adoption of Alexander* (1988) 44 Cal.3d 857, 864-65.) The opinion had to also disregard such highly damning evidence as Bunch's boasts that there "was never any doubt in our mind" that the Bank would have to return the property it had in effect stolen from the Jewells. Similar conduct by the Bank has earned this Court's censure in cases such as *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 908-09, another case in which Division One, District One again sided with the Bank of America.

makes a promise, fails to perform, denies it ever had a duty to perform, fights in court for years to prove it had no duty to perform when it knew full well it did, loses that fight, and then, when mandated by court order, belatedly and begrudgingly performs, *that* is not a "breach" of the original promise. It is submitted that only bias could produce such a result.

3. The Opinion Ignored the Substantial Evidence and Legal Authority Which Demonstrated the Jewells' Reliance Was Justifiable.

Reliance in a fiduciary relationship is measured by special standards; facts that would ordinarily require investigation may not excite suspicion, and the same degree of diligence is not required. (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 440; *Estate of Sanders, supra*, at 619.) The opinion ignored this in concluding the Jewells' reliance was not justifiable because they allegedly knew the promised loan was beyond Sullivan's lending limit. (App. A at 21.)

The Jewells proved their reliance was justifiable given their fiduciary relationship with the Bank, their intelligence, and information. (*Seeger v. Odell* (1941) 18 Cal. 2d 409, 415.) The Jewells dealt exclusively with Sullivan, and felt it was inappropriate to confer with Sullivan's superiors. (V.25:4282.) In addition, the Jewells got nothing but positive support from Sullivan, who had in the past regularly provided the funds he promised, even if they exceeded his lending limits. Sullivan's superiors also expressed their support to the Jewells; this signified Regional approval to the Jewells. This type of belief was precisely what the Bank's policy manual warned against.

Given the Bank's decision to place Sullivan in the role of vice president and branch manager, his assurances to the Jewells were the equivalent of "factual representations of an apparently knowledgeable agent for his principal". *Skeels v. Universal C.I.T. Credit Corporation* (3rd Cir. 1964) 335 F. 2d 846, 851.) In such a situation, it was entirely reasonable for the Jewells to rely on them.

4. The Opinion Refused to Consider the Law or the Facts Which Demonstrated the Bank's Acts Were the Proximate Cause of the Jewells' Injuries.

The opinion is wrong in stating there was no substantial evidence the Jewells' injuries were proximately caused by their involvement in O'Connell, that the Jewells' ultimate destruction was inevitable, and that the law on proximate cause is contrary to the Jewells' position. First, there was overwhelming evidence that but for Sullivan's initial inducement of the Jewells in becoming involved with O'Connell and later staying involved, the Jewells would not have suffered the damages they did. This evidence ranged from Sullivan's own admission he had "participated" in the Jewells' "difficult situation" (V.12:2509-10), to an internal Bank document which noted in November, 1980 that the Jewells' problems began with their 1976 involvement with O'Connell (R.A. 891). Simple common sense also provides support; had the Jewells not gotten involved in O'Connell, O'Connell would have collapsed and there would have been no subsequent drain on the Jewells' finances.[11]

Second, there was nothing at trial which proved that the Jewells' destruction was inevitable. The opinion seized on a number of factors which allegedly contributed to the Jewells' demise, yet all but one of them directly resulted from the Jewells' involvement in O'Connell and would not have occurred but for it. (App. A at 19.) The one remaining factor, the bankruptcy of one of the Jewells' debtors, was a very minor cause of their problems and could have easily been absorbed if the Jewells had not had the burden of O'Connell. (V.26:4500-8.)

Third, the opinion is wrong in stating that if other factors also contributed to the Jewells' economic problems, then the Bank was relieved of liability. (App. A at 19.) The law is clear that if several factors contribute to the occurrence of an event, a

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[11] Other evidence included the testimony of Jewells' expert witnesses that after the Jewells paid off the delinquent O'Connell loans in 1977, they could not pay back the Bank from their own operations because of their involvement with O'Connell, and were left with insufficient operating funds as a result of that involvement. (V.11:2350-51, V.25:4235-37, V.33:5805-06, 5812-13.) In addition, the Bank's own documents reflect its concern over the Jewells' finances as a result of their involvement in O'Connell. (R.A. 557, 658, 660, 648, 887, 888, 896.)

defendant is not absolved if his conduct was a *substantial* factor, or if the other factors were within the scope of the original risk to which the defendant subjected the plaintiff. (Prosser & Keaton, *The Law of Torts* (15th ed. 1984) §41, pp. 266, 268; §44, p. 303.) Since the later risks the Jewells' encountered were within the scope of the original risk to which the Bank subjected them, then necessarily the Bank is liable. (See, *Crystal Springs Trout Co. v. First State Bank, supra,* at 824.)

Fourth, the opinion's legal and factual analysis of the Jewells' eventual destruction is inaccurate. It is not true that a defendant is not liable if the plaintiffs' damages were "inevitable or due to unrelated causes", and the authority the opinion cites does not so hold. In addition, since the issue never came up at trial, there was minimal evidence on it; what little there was directly contradicts the opinion's statement.[12]

5. The Allegedly Internally Inconsistent Verdicts Can Be, And Should Have Been, Reconciled by the Court of Appeal.

It is the duty of appellate courts to reconcile superficially inconsistent findings. (*Brewer v. Simpson* (1960) 53 Cal.2d 567, 583; *Allen v. Sundean* (1982) 137 Cal.App.3d 216, 224.) This can easily be done in the instant case, yet the court simply flung up its hands in mock despair over its alleged inability to do so.

The jury could have found both that Sullivan, as the bank's agent, intended to the make the long-term loan, but that his superiors did not. That would still result in liability to the Bank since "a principal may be liable when he intentionally misinforms or withholds information from the agent and the agent thereupon innocently misrepresents." (*Barrett v. Bank of America, supra* at 1369-70.) Had not the court been searching for opportunities to reverse the judgment, it could have performed this simple task of reconciling the verdicts.

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[12] By taking the Jewells' deeds of trust, the Bank started a domino effect which caused the Jewells' creditors to scramble for assets; bankruptcies and lawsuits were then filed to prevent foreclosures. But for that original act of the Bank, the Jewells would not have been forced into bankruptcy.

V

CONCLUSION

For the reasons stated, this petition for review should be granted and this cause set for argument.

DATED: June 27, 1988

Respectfully submitted,

CAPPELLO & FOLEY

By: A. BARRY CAPPELLO

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VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner _____ ☐ a _____ of _____

_____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____

_____,

a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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On June 27, 1988, I served the foregoing document described as PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE on_____

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in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

see attached list

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Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-934

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

IRENE O'CONNELL KRUSE,
Petitioner,

VS.

BANK OF AMERICA, N.T. & S.A.,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal First Appellate District, Division One

PETITIONER'S REPLY BRIEF

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No. 88-934

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PETITIONER'S REPLY BRIEF

PRELIMINARY STATEMENT

The Bank of America's opposition brief ("Bank Opp.") demonstrates the urgent need for procedural guidelines when faced with an issue of judicial disqualification. Petitioner Kruse's case is particularly suited for formulating such guidelines because it involves (1) the refusal of a justice to make disclosure when confronted with the appearance of bias, (2) the refusal of a state court system to apply the "appearance of bias" standard, or to afford an evidentiary hearing to determine it, and (3) the inherent unfairness of a justice determining the question of his own bias. No guidelines presently exist. Inherent procedural protections are needed in order to make the objective standard of "appearance of bias" function in our judicial system.

The Bank argues that the disqualification issue was raised belatedly because of disclosures made to petitioner's counsel in another appellate proceeding, *In the Matter of the Estate of Gilda Barberis*.[1] Bank Opp., p.3. The disclosures of Justices Racanelli and Newsom at the *Barberis* hearing showed *de minimus* disqualifying grounds. App. P 104-110, S 1-4. Only after the Court of Appeal rendered its decision in this case demonstrating bias by refusing to follow appellate standards of review and ruling on legal theories neither pleaded nor argued, did counsel for petitioner become suspicious of the justices' motives. The infor-

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[1] No. A026709, slip op. at 3 (Cal.Ct.App. 1986). *See* Petitioner's Opening Brief, p. 9. The Bank asserts that Justice Racanelli's declaration of denial of ownership of a stock interest establishes "beyond dispute that he had never owned Bank stock." Bank Opp., p. 3, Bank App. B. Justice Racanelli's declaration states that he has "no independent recollection of statements in connection with oral argument . . ." in the *Barberis* case. The fact that three independent attorneys who attended the *Barberis* hearing in April of 1986 heard Justice Racanelli state that he owned "a few shares" (Declaration of Ares, App. P 105), that he "owned some stock" (Declaration of Gunn, App. P 107), or that he owned "an interest (Declaration of Deyhimy, App. P 109) in the Bank, far from laying the matter to rest, would cause a reasonable person to believe there was some probability that Justice Racanelli did have a financial interest of some sort in the Bank. A fourth declaration was submitted to the Court of Appeal by Mr. Lukens, who himself was present at the *Barberis* hearing and who also heard the disclosures. App. S 1-4.

mation subsequently learned about Justice Newsom was not known before the decision by the Court of Appeal in this case.

1. Mr. Flinn's Involvement With Justice Newsom's Family Corporation Well Preceded Its Dissolution, And Public Records Strongly Suggest That Mr. Flinn's Activities Caused Justice Newsom's Withdrawal From The Company Because Of Alleged Misconduct

In July of 1981, Justice Newsom was president of his family company, Squaw Valley Improvement Corporation, and was a one-sixth owner of the company, which was the major asset of the estates of Justice Newsom's parents.[2] App. T 5-6, U 7-8, E 48. Justice Newsom was also acting as executor of his parents' probate estates which were being concurrently administered in the Superior Court of the City and County of San Francisco.[3]

After a flurry of accusations by Mr. Flinn in court filings commencing in the summer of 1981 alleging misuse of funds and breach of fiduciary duties "in a number of various transactions", App. MM 65-68, V 9-10, W 11-14, AA 21, BB 22-24, CC 25-26 , Justice Newsom resigned from his position as president, App. G 61-65, and divested himself of all ownership of stock in the company, Bank App. C. The court filings in August of 1981 state that Mr. Flinn, who represented two sisters and a brother of the Justice, was the *only* attorney in the Leland, Parachini firm with sufficient familiarity with the misconduct and that the "specifics" could only adequately and fully be pleaded by Mr. Flinn. App. W 11-14. In March of 1983, Mr. Flinn petitioned to remove Justice Newsom as executor of the estates. App. DD 27-30 . In May of 1983, Justice Newsom waived over $33,000 in fees in the probate estates in order to settle his exposure to liability for the misconduct. App. HH 43-44. In a stipulation with Justice Newsom, Mr. Flinn's firm reserved the right to raise the matter in the future. App. GG 40-42.

The Bank of America seeks to eliminate the appearance of impropriety caused by Justice Newsom's relationship with oppos-

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[2] The Squaw Valley Improvement Corporation was valued at approximately $570,000 for estate tax purposes. App. U 7-8.

[3] *Estate of William A. Newsom*, Sup. Ct. No. 217-391; *Estate of Christine A. Newsom*, Sup. Ct. No. 223-586.

ing counsel by asserting that Justice Newsom "sold" all of his shares in the Squaw Valley Improvement Corporation to his two sisters and a brother in May of 1982 "in an arms length transaction" and that only "in June of 1982, *after* the sale" did Justice Newsom's sisters employ Mr. Flinn. Bank Opp., p. 5. Public documents conclusively establish otherwise. App. V, 9-10 through CC, 25-26.

At the very time that Mr. Flinn was forcing substantial concessions from Justice Newsom, Mr. Flinn was also representing the Bank of America in oral arguments held in the Court of Appeal in December of 1982 and in June of 1983 in *Sanchez-Corea v. Bank of America*, 197 Cal.Rptr. 701 (1983). Justice Newsom participated with Justice Racanelli in both hearings and reversed a large judgment against the Bank to the great benefit of Mr. Flinn and the Bank, as was discussed in our opening brief.[4]

In arguing that Mr. Flinn's role was one of "arms-length," Bank Opp., p. 5, the Bank ignores the fact that Mr. Flinn had placed Justice Newsom at an obvious disadvantage because of the compromising information he had allegedly accumulated and the aggressive actions he was taking against Justice Newsom in the probate matters. The fact that Mr. Flinn was able to compel substantial concessions from the Justice strongly suggests that Mr. Flinn was in a position of strength in his relationship with Justice Newsom.

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[4] Justice Holmdahl disqualified himself in the *Sanchez-Corea* proceeding *after* the December 1982 hearing, thereby requiring a second oral argument. App. NN, 69-70. Justices Racanelli and Newsom continued to serve, although the question of disqualification was now a factor. According to Justice Racanelli's declaration filed with the Supreme Court of California, Bank App. B, it was his usual practice in proceedings involving the Bank of America to disclose his debtor-creditor relationship resulting from periodic use of a Visa card. Bank App. B 9. However, according to the Declaration of Mrs. Sanchez-Corea, who attended both the December and June hearings in the *Sanchez-Corea* case, she had no recollection of Justice Racanelli volunteering or disclosing that he owned a Visa card or other disqualifying facts at either hearing. App. H 67. There is no question that prior to the 1984 repeal and replacement of California Code of Civil Procedure section 170, it was a disqualifying factor to own any stock in or have a loan with a party.

It matters not whether the vehicle of coercion is the carrot or the stick—a distinction between the two forces is without a difference. Mr. Flinn, although not Justice Newsom's personal attorney, was in a position of influence because of his involvement in Justice Newsom's family company. While his influence was not derived through friendship, the negative impact of his presence was even more compelling because of his possession of information potentially embarrassing to the Justice. Mr. Flinn's appearances before Justice Newsom as an attorney for the Bank in *Sanchez-Corea* and this case and Justice Newsom's decisions to sit under such circumstances were entirely improper.

Given the volatile nature of Mr. Flinn's information, it is understandable from a purely human point that the Justice would be reluctant to disclose the nature of Mr. Flinn's unique position. But Justice Newsom could simply have recused himself, and there would have been no due process constraints which required him to announce his reasons.[5]

The foregoing conduct squarely raises the issue of a systematic denial of equal protection in two major cases involving the Bank of America, resulting in reversals of large judgments against the Bank when both justices should have recused themselves.[6] In both cases, the Court of Appeal blatantly ignored the evidence of the case, substituted the Bank's facts in the place of the respondents' facts, weighed the evidence and made factual rulings on the sufficiency of the evidence and on the issues of liability, causation and reasonable reliance, refused to review the evidence as a whole, did not allow respondents the benefit of their evidence, did not allow respondents the benefit of all inferences and presumptions that could be drawn from the evidence, did not resolve all, or any, conflicts in the evidence in favor of respondents, and did not

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[5] This case presents the opportunity to announce the principle that a justice need not specify his reasons for recusal.

[6] The factual statements in the decision of the Court of Appeal reported at 197 Cal.Rptr. 701 (1983) should be compared to the factual statements in the decision of the California Supreme Court at 38 Cal.3d 892 (1985), which reinstated the judgment. It is obvious from reading the two decisions that the Court of Appeal refused to adopt the facts in the light most favorable to the plaintiffs and instead adopted, as has happened in this case, the facts most favorable to the Bank of America.

conform in any respect to the established rules governing appellate review.[7]

While this Court has recognized that state courts must provide equal protection in appellate procedures, *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972), there as yet is no decision rendered by this Court requiring state courts to refrain from discrimination in applying the appellate standards of reviewing the evidence.

2. The California Courts Refuse To Follow The Appearance Of Bias Standard

In order to comport with due process requirements, it is absolutely necessary that all state courts recognize that a judicial panel must be free from the "appearance" of bias, a standard which the Courts of California now refuse to accept. Acting Chief Justice Mosk of the California Supreme Court, who refused to review this case, is probably the foremost opponent of the "appearance of bias" standard, having soundly rejected it in *Andrews v. Agricultural Labor Relations Bd.* 28 Cal.3d 781 (Cal. 1981), stating that such a standard would be "vague, unmanageable and laden with potential mischief." *Id.* at 793.

Justice Mosk's vigorous denunciation of the objective standard was severely criticized by Justice William P. Clark, Jr., who stated that the majority decision failed "to protect due process and public confidence concerns" (*Id.* at 802). He pointed out that "The 'actual bias' standard protects only against the most egregious and flagrant instances of bias," and that "Only in truly rare cases will such blatant displays of bias be openly disclosed." *Id.*[8]

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[7] See Justice White's opinion in *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 696-98 (1962), wherein a judgment was reinstated because of the Ninth Circuit's refusal to view the evidence in the light most favorable to the plaintiffs.

[8] Justice Clark asked this poignant question:

> Admittedly use of "an appearance of bias" standard may result in disqualifications both in cases of actual bias and in cases where there is no bias. But when an individual's fundamental right to a fair hearing is at stake, is it not better to err on the side of justice rather than to impose the risk that in an instance of actual but unprovable bias the prejudiced party will be without remedy? 31 Cal.3d at 803.

Justice Clark's plea for the use of a due process standard, long since adopted by the American Bar Association and embraced by the Supreme Court of the United States in numerous cases,[9] was again flatly rejected by the California Supreme Court in *Kaufman v. Court of Appeal*, 31 Cal.3d 933 (Cal. 1982) and again by Justice Mosk in this case, by refusing to review on the ground that " . . . petitioners have not made a prima facie showing of conflict of interest or [actual] bias, much less a deprivation of due process of law." App. C 37. The only remedy available to petitioner is to seek certiorari in this Court.

3. Procedural Due Process Requires That Justices Not Pass Judgment Upon Themselves

Once having adopted the objective standard for judicial disqualification, procedural due process necessarily requires that justices not subjectively determine whether their impartiality might reasonably be questioned. Procedural safeguards at the minimum dictate that this decision be decided by someone other than the challenged justice.[10] The basic procedural requirement that the appearance of bias be decided by someone other than the challenged justice or judge is already a workable standard which enjoys wide use at the trial level.[11]

Cases cited by the Bank for the proposition that appellate justices should decide their own disqualification, *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*,

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[9] *See, e.g., Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150, *reh'g denied*, 393 U.S. 1112 (1969), *Peters v. Kiff*, 407 U.S. 493, 502 (1972); and more recently *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) and *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194, 2202-05 (1988).

[10] Note, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 Calif. L.R. 1445, 1483-84 (1981). The author further states at pages 1483-84, "Who is to pass upon the sufficiency of the affidavit is an important related question. The judge challenged is not a wise choice, both because she is an interested party and because she may tend to pass on the truth of the affidavit rather than the sufficiency of it . . . Flexibility is therefore permitted in assessing the alleged partiality of a judge, but the decision would never be made by the challenged judge herself."

[11] 28 U.S.C.A. § 144 (West 1968); California Code of Civil Procedure section 170.3(c)(5) (Deering Supp. 1988).

325 U.S. 897 (1945), *Laird v. Tatum*, 409 U.S. 824 (1972), *MacNeil Bros. Co. v. Cohen*, 264 F.2d 186, 189 (1st Cir. 1959), are federal cases decided before the amendment to 28 U.S.C.A. section 455 (West Supp. 1988) which adopted the appearance of bias standard and eliminated the words "in his opinion," thereby changing the test from a subjective one to an objective one.[12] *Martin-Trigona v. Gouletas*, 634 F.2d 354, 355 n.1 (7th Cir.) *cert. denied*, 449 U.S. 1025 (1980), also cited by the Bank, provides support for petitioner's position rather than the Bank's because Chief Judge Fairchild, to whom the petition for disqualification was addressed, declined to participate, recusing himself from the disqualification issue.

4. The Judgment Below Is Final For Purposes Of Review

The Bank urges that the writ should be denied on the technical ground that the judgment below is not final, arguing that 28 U.S.C.A. section 1257 (West 1966 & Supp. 1988) is available only with respect to "final judgments or decrees." Bank Opp., p. 6. However, the state appellate court's rejection of petitioner's constitutional claims is final since petitioner will be required to retry the case and will not be able to raise the constitutional questions again. Since the remanded proceedings do not include the constitutional issues, we have received a final decision for the purposes of section 1257. This Court applies a flexible test of whether the judgment is, in practical effect, a final decision as to federal issues and therefore this case falls easily within the category of a final decision. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 476-77, 480, 486 (1975).

The cases relied upon by the Bank, *Cincinnati Street Railway Co. v. Snell*, 179 U.S. 395, 397 (1900); *Odell v. Espinoza*, 456 U.S. 430 (1982); *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947), are all cases in which the federal issue was raised in the state trial court, and the appellate decisions reversing and remanding were not challenged as being the product of an unconstitutional appellate review.

Even if the general rule of finality could be applied here, the present case would fall squarely within the exception stated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 482-83 (1975) on

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[12] *See* Rehnquist dissent in *Liljeberg*, 108 S.Ct. 2194, 2209.

the ground that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and failure to consider the state court decision immediately "might seriously erode federal policy." There is no question that to allow the State of California appellate system to continue to reject the due process requirements of the "appearance of bias" standard announced by this Court would seriously erode federal policy.

5. Petitioner Kruse Raises Federal Questions Duly Presented In The State Court Proceedings

The Bank argues that because the Jewells did not specify the constitutional issues in the state court proceedings in connection with their concurrent petition for certiorari, No. 88-918, petitioner Kruse in this proceeding, No. 88-934, must be denied review by this Court. Bank Opp., p. 8. Suffice it to say that petitioner Kruse raised each and every constitutional issue on numerous occasions in the state appellate court proceedings and has attached over 33 pages of references to the constitutional questions raised below in the appendix to her opening brief. App. Q 111-144. Petitioner Kruse should not be denied relief because the Jewells allegedly did not supply specificity in their constitutional arguments.

The Bank also argues that the lawyer-client relationship between Mr. Flinn and Justice Newsom's family corporation is new evidence which was not presented below and that this precludes her from obtaining relief from this Court. Bank Opp., pp. 8-9. However, the denial of due process stems from Justice Newsom's and the Bank's counsel's concealment of relevant disqualifying information. Since Justice Newsom and the Bank's counsel remained silent in the face of requests for disclosure and since an evidentiary hearing was denied, petitioner Kruse has properly raised the issue of the failure to disclose in her state court briefs and is now entitled to relief from this Court.

The Bank relies incorrectly upon *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 158 n.16 (1970), Bank Opp., p. 8, which involves the review of a trial court decision in which the record was deficient. Here, where the wrong has been perpetrated by an appellate court in which there is no record, affidavits on the facts demonstrating the bias are appropriately submitted to this Court, particularly where this information has been supressed. More

applicable to our facts are *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-46 (1944) and *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580-81, *reh'g denied* 329 U.S. 667 (1946), which discuss at length the federal court's inherent powers to provide relief in instances of interference with the administration of justice.[13]

6. Petitioner Kruse Does Not Confine Her Allegations to Mere Error In The Lower Court's Decision, But Is Alleging That The Error Constitutes Violations Of Due Process Of Constitutional Proportions

Finally, the Bank argues that petitioner's contentions constitute arguments that the Court of Appeal simply "misinterpreted" her position and that her petition is only asking this Court to review state court error. Bank Opp., p. 12. However, the seriousness of the misconduct far surpasses claims of mere error. Petitioner was completely denied a fair and objective appellate review and the court below reversed her judgment on legal theories and issues *different* from those on which the case was tried, errors so serious that they have been recognized by this Court as a violation of due process. *Spevack v. Klein*, 385 U.S. 511, 518 (1967); *Cole v. Arkansas*, 333 U.S. 196, 202 (1948). The Bank has not attempted to deny that this happened, but instead opines that "undoubtedly such a sentiment is shared by most unsuccessful appellants." Bank Opp., p. 12. Nor has the Bank denied that Justice Newsom has a family heritage closely associated with the Bank or that he obtained a substantial loan from the Bank while conferencing on the case.[14]

---

[13] There is no discussion of the issue of use of affidavits at the appellate level in the other case cited by the Bank, *Killian v. United States*, 368 U.S. 231, 243 (1961), *reh'g denied*, 368 U.S. 979 (1962). Bank Opp., pp. 8-9. In fact, this Court granted *certiorari* because the government had allegedly withheld evidence and remanded the case for an evidentiary hearing in the district court. *Id.* at 244.

[14] The Bank makes the incredible argument that a loan is no longer a disqualifying financial interest under California law, citing Civil Procedure section 170.1 (Deering Supp. 1988). Bank Opp., p. 4. But section 170.1(a)(6) provides that a trial judge is disqualified if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Certainly, the negotiation of a major credit

CONCLUSION

We submit that the pain and indignation of a denial of due process of the magnitude that has occurred in this case would be shared by any rational human person subjected to such an ordeal. For the foregoing reasons, petitioner's request for certiorari should be granted.

Respectfully submitted,

WILLIAM M. LUKENS
LUKENS, COOPER, PERRY & DRUMMOND
One Maritime Plaza, Suite 1600
San Francisco, CA 94111
(415) 433-2261
By WILLIAM M. LUKENS

FREDERICK E. WATSON
FREDERICK E. WATSON,
A Professional Corporation
111 Civic Drive, Suite 1600
Walnut Creek, CA 94596
(415) 947-0393
By FREDERICK E. WATSON

Attorneys for Petitioner
Irene O'Connell Kruse

Dated: January 11, 1989

---

relationship with a party appearing before a judge should be a disqualifying factor under this standard.

APPENDIX

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APPENDIX S

Civil No. A033064-A039161

Court of Appeal of the State of California
First Appellate District
Division One

[Filed June 10, 1988]

Irene O'Connell Kruse,
Plaintiff, Respondent and Cross-Appellant,

George R. Jewell and Charles Duck,
Trustee of the Bankruptcy Court of
George M. Jewell and Laura E. Jewell,

Cross-Complainants, Respondents,
Cross-Appellants and Appellants,

v.

Bank of America National Trust and Savings Association,

Defendant, Appellant, Cross-Respondent and Respondent.

Appeal from the Judgments of the
Superior Court of the State of California
County of Sonoma
Honorable Laurence K. Sawyer, Judge

DECLARATION OF WILLIAM M. LUKENS IN SUPPORT OF PLAINTIFF-RESPONDENT AND CROSS-APPELLANT IRENE O'CONNELL KRUSE'S REQUEST THAT THE JUSTICES OF DIVISION ONE GRANT REHEARING AND DISQUALIFY AND RECUSE THEMSELVES.

William M. Lukens, under penalty of perjury, certifies as follows:

1. I am one of the attorneys for plaintiff-respondent and cross-appellant Irene O'Connell Kruse in the above appeal. On the afternoon of April 29, 1986, I was present at an oral

argument of another case, Appeal No. A026709, entitled *In the Matter of the Estate of Gilda Barberis*, in which the appellant was Frank Barberis (whom I represented), and the Bank of America was respondent.

2. Before argument commenced, Justice Racanelli announced that he wished to disclose that he owned stock in the Bank of America, and Justice Newsom then stated that he wished to disclose that he had a loan from the Bank of America, and that in Justice Racanelli's opinion this constituted a ground for disqualification and that they would not proceed unless I consented to their hearing the matter. I reflected upon this offer of the Justices to disqualify themselves, but only briefly because I immediately made a decision to consent to their participating because the case involved a narrow issue, attorneys' fees, and the amount in controversy was small. The Trial Court decision in the *Barberis* case had been in favor of our client, and against the Bank, on the main issue presented in the trial; the Bank, as trustee, was ordered to make distribution of income to our client, as beneficiary of the trust, which the Bank had been refusing to do. The Bank did not appeal from that ruling. The only appeal was taken by our client from the Probate Judge's order denying a requested allowance of $30,000 in attorneys' fees for successfully obtaining the order requiring the Bank to pay out the trust income. I therefore concluded that since the Justices had announced their disqualification, and since the Bank was not appealing as an aggrieved party, there was no reason to think that the Justices would be influenced to favor the Bank, or be anything less than fair and impartial, in that particular case.

3. I waived the disqualification of Justices Racanelli and Newsom in the *Barberis* matter only because I considered their disqualification to be unimportant in that particular case for the reasons stated above. At the time of that hearing on April 29, 1986, I did not know that the present appeals had been assigned to Division One; the first notice from the Court that we received, which indicated that the appeals had been assigned to Division One, was in July of 1986, and at

that time I did not recall the above incident which had occurred two months earlier when there had been brief mention, and brief consideration by myself, of stock ownership and loans.

4. The first recollection I had of that incident occurred on June 7, 1988 when co-counsel Frederick Watson related to me portions of a conversation he had had with Mr. Dan Crawford, one of the partners in the law firm of Carroll, Burdick & McDonough, the firm which, through Mr. Crawford, handled the trial and appeal in the *Sanchez-Corea v. Bank of America* case, which was decided by this Division of the Court in favor of the Bank. Mr. Watson told me that Mr. Crawford said that they had to argue the *Sanchez-Corea* appeal twice because it was argued to a panel consisting of Justice Racanelli, Justice Newsom and a pro-tem Judge appointed, and two months after the appeal was argued and taken under submission that the Justice pro-tem announced that he had to disqualify himself because he owned stock in the Bank of America. This triggered in my mind a recollection of the incident in April 1986, when Justice Racanelli announced he owned stock in the Bank and Justice Newsom said that he had a loan from the Bank.

* * *

5. On June 8 and 9, 1988, I obtained copies of Form 721, statements of economic interests with respect to the members of the panel assigned to this case. Attached hereto as Exhibits A, B, C and D are reports filed by Justice Newsom for the years 1984, 1985, 1986 and 1987 revealing an extensive loan relationship with the Bank of America. Attached hereto as Exhibits E, F, G and H are reports filed by Justice Racanelli for the same years which do not identify the extent of his ownership of Bank of America stock, presumably because it is in an amount below the reportable limits. However, ownership of *any* shares creates disqualification and its absence in the reports has no bearing on the duty of a Justice to disqualify himself.

The foregoing facts are within my personal knowledge, and if called upon as a witness I could, and would, competently testify thereto.

Executed this 10th day of June, 1988, at San Francisco, California.

/s/ William M. Lukens
William M. Lukens

APPENDIX T

Placer County

73782

48448

Official Records Requested by
First American Title Co.
Dec. 10 9:11 AM '80

Gay Trombley
Placer Co Recorder

48448 $6.00

When recorded mail to:
William Newsom
350 McAllister St
San Francisco, CA 94102

Substitution of Trustee
and
Deed of Reconveyance

Whereas, on *January 10, 1978* in Book 1929 of Official Records, at Page *205* of *Placer* County, California a Deed of Trust was recorded securing payment of *$5,324.00* and other obligations, executed by *William A Newsom, Jr.* to *Trustors Security Service, a California corporation*, as Trustee and *Squaw Valley Improvement Corporation*, as Beneficiary.

Whereas, the indebtedness secured by said Deed of Trust has been fully paid and satisfied; however, the above named trustee does not find itself in a position to issue its Deed of Reconveyance.

Now Therefore, *Squaw Valley Improvement Corporation* as Beneficiary, does hereby substitute *Squaw Valley Improvement Corporation*, as Trustee in place and stead of the first above referenced trustee, under said Deed of Trust.

Further, as substituted Trustee herein, *Squaw Valley Improvement Corporation* does hereby reconvey without warranty to the

person or persons legally thereto entitled, all estate now held by them under said Deed of Trust.

In Witness Whereof, the undersigned have caused these present to be executed on this *8th* day of *December*, 1*980.*

Squaw Valley Improvement
Corporation

by /s/ William Newsom,
President

By

(Corporation)

STATE OF CALIFORNIA
COUNTY OF PLACER } ss.:

On *December 8, 1980* before me, the undersigned, a Notary Public in and for said State, personally appeared *William A Newsom* known to me to be the President of the corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

Witness my hand and official seal.

Signature /s/ Leslie Furlong [Seal]

Notary Public—California

48448

Vol 2333 Page 422

APPENDIX U

Brennan J. Newsom
Attorney at Law
1015 Battery Street
San Francisco, Ca. 94111
(415) 421-7876

Attorney for: Executor

Superior Court of California,
County of San Francisco
City Hall, Van Ness & Grove Streets
San Francisco, California 94102

[Filed February 1, 1979]

Estate of: William A. Newsom,
Decedent.

Case Number: 217 391

Inventory and Appraisement
Partial No. 2

Date of Death or Appointment of Guardian
of Conservator: March 4, 1977

Appraisals

1.	Total appraisal by representative (Attachment 1)	$ 29,875.32
2.	Total appraisal by referee (Attachment 2)	$ 989,018.80
	Total	$ 1,018,894.12

I certify and declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on August 31, 1977 at San Francisco, California.

/s/ William A. Newsom, Jr.
William A. Newsom, Jr.

Statement of Attorney
Regarding Bond

4. Bond is waived

Date: August 31, 1977

/s/ Brennan J. Newsom
(signature of attorney
for estate)

* * *

Attachment No. Two

Item No.	Description	Appraised Value
1.		

Community Property—Stock

3. Beneficial interest in 220 shares of Squaw Valley Improvement Corporation Stock, held in a Voting Trust, and evidenced by a Voting Trust Certificate in the names of the decedent and his surviving spouse. This corporation is a closely-held California corporation.

Value at date of death $569,085.00

* * *

Attachment No. Two

1.

Separate Property—Stocks & Bonds

7. Beneficial interest in 1 share of Squaw Valley Improvement Corporation Stock, held in a Voting Trust, and evidenced by a Voting Trust Certificate in the name of the decedent alone. This corporation is a closely held California corporation.

Value at date of death	$ 2,586.75
Community property total	$887,754.00
Separate property total	$101,264.80
Total attachment two	$989,018.80

APPENDIX V

Law Offices Of
Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick
333 Market Street, 27th Floor
San Francisco, California 94105
Telephone (415) 957-1800

Harvey L. Gould

July 29, 1981

Mr. Edward Ottonello
Probate Department
City Hall
400 Van Ness Avenue
San Francisco
California 94102

Re: Estate of Christine A. Newsom
Action Number: 223 586
and
Estate of William A. Newsom, Sr.
Action Number: 217 391

Dear Mr. Ottonello:

This will confirm our conversation of July 29, during which you advised me that the various Petitions relating to the above Estates presently noticed for hearing on Friday, July 31, will not proceed to hearing on that date since the court is not in session on Fridays with respect to estate matters. You explained that what will happen is that on Friday the various Petitions will simply be rescheduled for hearing on an alternate date. I explained to you that Mr. David Flinn of our office is handling these matters on behalf of our clients, Barbara Newsom, Sharon Mohun and Patrick Newsom, but Mr. Flinn is presently on vacation. He is not due back until August 12 and, according to his calendar, is already rather heavily booked during the week of August 17. Any consideration that you might be able to give to his calendar commitments would certainly be appreciated and in that regard, if it is at all possible to schedule the various hearings during the

week of August 24, it appears that he would be able to personally handle the hearings. In this regard, it is my understanding that, on behalf of our clients, Mr. Flinn does intend to file objections to the various Petitions.

A further complicating factor is that several of the notices which we recently received refer to Petitions filed on July 10. When somebody from our office was at the court on July 28, he was told that the various papers filed in connection with these recent Petitions are not presently available for copying as they are somewhere "in transit" between the Clerk's office and the Probate Department. Accordingly, we are thus in the position of not being able to meaningfully respond to various of the Petitions, in any event, for the simple reason that we have not been able to see the documents filed in their support. Once the new hearing date is set, we will hopefully be in a position to be able to procure a copy of a full set of all pertinent documents. Should we encounter any difficulty in obtaining a copy of those documents, we may be in touch with you further to solicit your cooperation in assisting us in that connection.

Thank you for your help in clarifying the status of these various Petitions.

Very truly yours,

/s/ Harvey L. Gould

Harvey L. Gould

kah

cc: Brennan J. Newsom, Esq.
Honorable William A. Newsom, Jr.
Lawrence B. Silver, Esq.

I spoke with Mr. Gould on 7-30-81. He informed me that the petition for fees for extraordinary services would not be opposed. The petition for statutory fees on account *will* be opposed and that matter is continued to 8-10-81.

Dated 7-31-81

Ed Ottonello

APPENDIX W

The annexed instrument is a correct copy of the original
in my office attest-certified January 4, 1989
by Uranie Fung
Deputy Clerk
[Seal]

Harvey L. Gould
Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick
333 Market Street, Suite 2700
San Francisco, CA 94105
Telephone (415) 957-1800

Attorneys for Respondents,
Barbara Newsom, Sharon Mohun
and Patrick Newsom

Superior Court of California
County of San Francisco
No. 217391

[Filed August 6, 1981]

Estate of
William A. Newsom, Sr.,
Deceased.

Objection to Petition of Attorney's Fees on
Account and Request for Continuance

Hearing
Date: 8-10-81
Time: 9:00 am

Respondents, Barbara Newsom, Sharon Mohun and Patrick Newsom, in objection to the petition for allowance of attorney's fees on account filed by Brennan J. Newsom in the above-entitled matter and by way of request for continuance of the hearing on said petition, state as follows:

1. Respondents are three of the six beneficiaries of the subject estate (each being a child of the decedent), and as

such are entitled to inherit and thus to receive upon distribution a one-sixth interest in the estate, or a total among them of one-half of the estate.

2. Respondents object to the petition for allowance of attorney's fees upon the following grounds:

(a) The executor has not approved the petition;

(b) Said petition is premature in that there are no accountings before the Court from which it can be concluded that necessary legal services were rendered or, if rendered, were competently rendered, petitioner having failed despite numerous requests by respondents and by the executor to prepare such an accounting; the decedent died on March 4, 1977, and an accounting in the estate is long overdue;

(c) Respondents are informed and believe that petitioner has been guilty of negligence in the performance of his duties and of breach of fiduciary obligations by the use of estate assets for his own uses and purposes in a number of various transactions, the specifics of which could only adequately and fully be pleaded and proved herein by David B. Flinn, and respondents pray leave to amend this objection appropriately after Mr. Flinn's return from vacation.

3. Respondents believe that upon the filing of an accounting in the estate they will be entitled to have petitioner surcharged, and believe that the surcharge will exceed the amount of petitioner's one-sixth share of the estate. If the subject petition is granted respondents fear that the further dimunition of assets in the estate will accordingly jeopardize their chances of receiving the full inheritance to which they are entitled.

The attorney who has handled the estate and related matters for Respondents is David B. Flinn. Mr. Flinn is now on vacation and is not due to return to this office until the week of August 10. According to his calendar he has commitments the week of August 17 which may require his

travel. Mr. Flinn is the only attorney in the law firm with sufficient familiarity with these matters to fairly represent Respondents' interests regarding the Petition to which this Objection is in reply. A continuance in the hearing of this Petition for several weeks will not cause any prejudice herein.

Wherefore, Respondents respectfully pray that the hearing on the petition of Brennan J. Newsom for allowance of attorney's fees on account be continued to August 24, 1981, and that when heard, said petition be denied, and for such other and further relief as the Court deems proper.

Dated: August 4, 1981.

Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick

By /s/ Harvey L. Gould
Harvey L. Gould
Attorneys for Respondents—
Barbara Newsom, Sharon
Mohun and Patrick Newsom

Proof of Service By Mail—
CCP 1013a, 2015.5

I declare that: I am employed in the county of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 333 Market Street, Suite 2700, San Francisco, California. On August 5, 1981 I served the attached Objection to Petition for Allowance of Attorney's Fees on Account and Request for Continuance on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Brennan J. Newsom, Esq.
950 Battery Street
San Francisco, California 94111

Lawrence B. Silver, Esq.
Feldman, Waldman & Kline
2700 Russ Building
235 Montgomery Street
San Francisco, California 94104

I decare under penalty of perjury that the foreging is true and correct and that this declaration was executed on August 5, 1981 at San Francisco, California

/s/ Kathleen Hile
Kathleen Hile

APPENDIX X

The annexed instrument is a
correct copy of the original
on file in my office
attest-certified January 4, 1989
By Uranie Fung
Deputy Clerk

Harvey L. Gould, Esq.
Leland, Parachini, Steinberg,
Flinn Matzger & Melnick
333 Market Street, 27th Fl.
San Francisco, CA 94105
Telephone (415) 957-1800

Attorneys for Respondent
Barbara Newsom, Sharon Mohun
and Patrick Newsom

Superior Court of the
State of California
City and County of
San Francisco

No. 217391

[Filed August 10, 1981]

Estate of William A. Newsom, Sr.
Deceased.

Notice of Continuance

To All Parties Herein and to Their Respective Counsel of Record:

Please take notice that the Hearing on the Petitions of Brennan J. Newsom for attorneys fees, most recently scheduled for hearing on Monday, August 10, 1981, has been continued for Hearing to

Wednesday, September 30, 1981 at the hour of 9:00 a.m. in the Probate Department of the above-entitled court.

Dated: September 7, 1981.

Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick

By /s/ Harvey L. Gould
Harvey L. Gould
Attorney for Respondents

Proof of Service By Mail—
CCP 1013a, 15.5

I declare that: I am employed in the county of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 333 Market Street, Suite 2700, San Francisco, California. On August 7, 1981, I served the attached Notice of Continuance on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Brennan J. Newsom, Esq.
950 Battery Street
San Francisco, CA 94111

Lawrence B. Silver, Esq.
Feldman, Waldman & Kline
2700 Russ Building
235 Montgomery Street
San Francisco, CA 94104

Edwin C. Shiver, Esq.
Shiver & Stadum
505 Sansome Street, Suite 1100
San Francisco, CA 94111

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on August 7, 1981 at San Francisco, California.

/s/ Kathleen Hile
Kathleen Hile

APPENDIX Y

Shiver & Stadum
Attorneys at Law
Suite 1100
505 Sansome Street
San Francisco, California 94111
Telephone (415) 956-2400

September 25, 1981

Honorable John A. Ertola
Judge of the Superior Court
Department 6, City Hall
San Francisco County Superior
Court, Room 336
San Francisco, California 94102

Re: Estates of William/Christine Newsom
San Francisco County
Nos. 217391/223586

Dear Judge Ertola:

As special counsel for the Executor in the two referenced Estates, this letter will confirm that by agreement between counsel for the Executor and for the Objectors, the Petitions for allowance on account of fees filed by Brennan J. Newsom, Esq., now set for hearing on September 30, 1981, shall be removed from the Probate Court calendar, subject to being reset upon appropriate notice.

Very truly yours,

/s/ Edwin C. Shriver
Edwin C. Shriver

ECS/cdt
cc: David B. Flinn, Esq.
Brennan J. Newsom, Esq.
Honorable William A. Newsom, Jr.

APPENDIX Z

The Annexed Instrument
is a Correct Copy of the
Original on File in My Office
Attest-Certified January 4, 1989
By Uranie Fung
Deputy Clerk

Brennan J. Newsom, Esq.
950 Battery Street, Suite 300-A
San Francisco, California 94111
Telephone: (415) 421-7876

Attorney for Executor
Superior Court Of The State
Of California
For The City and County
of San Francisco

[Filed September 28, 1981]

Estate of
William A. Newsom,
Deceased.

No. 217, 391 Probate Dept.
Second Account and Report of
Executor And Petition For Its
Settlement

Petitioner, William A. Newsom, Jr., Executor of the will of the above named decedent, hereby presents his second account and report of the administration of the estate for the period March 14, 1979 to and including June 10, 1981 and alleges:

Accounting: Attachment 1, made a part hereof, is a statement of the receipts and disbursements of the estate for the period stated above. Vouchers evidencing payment of disbursements are held by executor and are available for inspection.

Assets on Hand. Schedule 5 of Attachment 1 is a statement of the assets of the estate as of June 10, 1981.

Wherefore, petitioner prays that the account and report be settled, allowed and approved, and all acts and transactions of petitioner set forth therein or relating to the matters set forth therein be ratified, confirmed and approved, and for all other proper orders.

Dated: Sept. 23, 1981

/s/ William A. Newsom, Jr.
William A. Newsom, Jr.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on September , 1981 at San Francisco, California.

/s/ William A. Newsom Jr.
William A. Newsom Jr.

APPENDIX AA

Law Offices of
Leland, Parachini, Steinberg, Flinn,
Matzger & Melnick
333 Market Street - 27th Floor
San Francisco, California 94105
Telephone: (415) 957-1800

David B. Flinn

October 12, 1981

Superior Court
City Hall
400 Van Ness Avenue
San Francisco, CA 94102

Attention: Mr. Ed Otonello, [sic]
Probate Examiner

Re: Estate of William A. Newsom,
No. 217391
Estate of Christine A. Newsom,
No. 223586
Hearing Date: October 15, 1981

Gentlemen:

Enclosed are an original and one copy each of our objections to the executor's accounts in the above matters, both of which are on the October 15, 1981 calendar.

After the objections are filed, please return the copies to us, endorsed "Filed," in the enclosed envelope.

Thank you.

Sincerely,

/s/ David B. Flinn
David B. Flinn

DBF:js

Enc.

APPENDIX BB

The Annexed Instrument
is a Correct Copy of the
Original on File in My Office
Attest-Certified January 4, 1989
By Uranie Fung
Deputy Clerk

David B. Flinn
Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick
333 Market Street, Suite 2700
San Francisco, CA 94105
Telephone: (415) 957-1800

Attorneys for Objectors

Superior Court of California

County of San Francisco

[Filed October 15, 1981]

No. 217,391

Estate of
William A. Newsom,
Deceased.

Objection to Second Account
and Report of Executor

Hearing Date: October 15, 1981

Time: 9:00 a.m.
Probate Department

Barbara Newsom, Sharon Mohun and Patrick Newsom object to the second account and report of executor filed on September 25, 1981 on the ground that said accounting takes credit for disbursements made with relation to the Nicasio property which were in fact receipts, and on the further ground that these objecting parties are unable to determine from the descriptions

contained in said accountings whether or not the other items are fully and truly reflective of actual events and/or reflect proper items of receipt or disbursement.

Dated: October 12, 1981

Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick

By /s/ David B. Flinn
David B. Flinn

Attorneys for Objectors

Proof of Service by Mail—
CCP 1013A, 2015.5

I declare that: I am employed in the county of San Francisco, California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is: 333 Market Street, Suite 2700, San Francisco, CA 94105. On October 12, 1981, I served the attached Objection to Second Account and Report of Executor on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco addressed as follows:

Brennan J. Newsom, Esq.
950 Battery Street, Suite 300-A
San Francisco, CA 94111

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 12, 1981, at San Francisco, California.

/s/ Jane Simoneaux
Jane Simoneaux

APPENDIX CC

The Annexed Instrument
is a Correct Copy of the
Original on File in my Office
Attest-Certified January 4, 1989
By Uranie Fung
Deputy Clerk

David B. Flinn
Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick

333 Market Street, Suite 2700
San Francisco, CA 94105

Telephone: (415) 957-1800

Attorneys for Objectors

Superior Court of California

County of San Francisco

[Filed October 15, 1981]

No. 223,586

Estate of
Christine A. Newsom,
Deceased.

Objection to First Account
and Report of Executor

Hearing Date: October 15, 1981

Time: 9:00 a.m. Probate Dept.

Barbara Newsom, Sharon Mohun and Patrick Newsom object to the first account and report of executor filed on September 25, 1981 on the ground that said accounting takes credit for disbursements made with relation to the Nicasio property which were in fact receipts, and on the further ground that these objecting

parties are unable to determine from the descriptions contained in said accountings whether or not the other items are fully and truly reflective of actual events and/or reflect proper items of receipt or disbursement.

Dated: October 12, 1981

Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick

By /s/ David B. Flinn
David B. Flinn
Attorneys for Objectors

Proof of Service By Mail—
CCP 1013A, 2015.5

I declare that: I am employed in the county of San Francisco, California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is: 333 Market Street, Suite 2700, San Francisco, CA 94105. On October 12, 1981, I served the attached Objection to First Account and Report of Executor on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco addressed as follows:

Brennan J. Newsom, Esq.
950 Battery Street, Suite 300-A
San Francisco, CA 94111

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 12, 1981, at San Francisco, California.

/s/ Jane Simoneaux
Jane Simoneaux

APPENDIX DD

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Original on File in My Office
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By Uranie Fung
Deputy Clerk

David H. Melnick
Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick
333 Market Street—27th Floor
San Francisco, California 94105
Telephone: (415) 957-1800

Attorneys for Petitioners

Superior Court of California

City and County of San Francisco

No. 217 391

[Filed March 28, 1983]

Estate of William Newsom
Deceased.

Petition to Compel Accounting and Final Distribution
(Probate Code Sections 922 and 1025.5)

Petitioners, Sharon Mohun, Barbara Newsom and Patrick Newsom hereby allege:

1. That they are the children of the decedent and residuary legatees. They are persons interested in the above estate.

2. That the decedent died on March 4, 1977. Over 18 months have elapsed since the date of issuance of Letters Testamentary.

3. In July 1979 the executor of the estate through his attorney filed the First Account and Report covering a period from March 4, 1977 to March 13, 1979.

4. On September 25, 1981 the executor filed the Second Account and Report covering the period from March 14, 1979 to and including June 10, 1981.

5. No report or accounting has been filed since the Second Account.

6. Petitioners are informed and believe and on that information and belief allege that the estate is in a proper condition to be closed but that the executor has failed and declined to do so.

Wherefore, petitioners pray for an order directing the executor and his attorney to render full and verified account and report of his administration and compelling the executor to distribute the assets in the estate in accordance with the decedent's Last Will and Testament and for an order citing the executor to appear before the Court and show the condition of the estate and the reasons why the estate cannot be distributed and closed.

Petitioners further pray that if the executor fails to take such action within ten days of the rendition of the Order, that the executor be removed as executor and that a new executor be appointed in his place. That if necessary the Court compel the accounting by attachment as provided in Probate Code Section 922 and order a reduction in fees pursuant to Probate Code Section 1025.5.

Dated: March 21, 1983

Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick

By /s/ David H. Melnick
David H. Melnick

Memorandum of Points and Authorities
Probate Code section 922
Probate Code section 1025.5

Verification

The undersigned declares:

I am one of the petitioners in the above entitled matter. I have read the foregoing Petition To Compel Accounting And Final Distribution and know the contents thereof. The same is true of my own knowledge except as to matters which are stated on my information and belief, and as to those matters I believe it to be true.

Executed on March 10, 1983 at 18-6th Ave., San Francisco, California under penalty of perjury.

/s/ Barbara Newsom

Verification

The undersigned declares:

I am one of the petitioners in the above entitled matter. I have read the foregoing Petition To Compel Accounting And Final Distribution and know the contents thereof. The same is true of my own knowledge except as to matters which are stated on my information and belief, and as to those matters I believe it to be true.

Executed on March 11, 1983 at 7 Jordan, San Francisco, California under penalty of perjury.

/s/ Sharon Newsom Mohun

Verification

The undersigned declares:

I am one of the petitioners in the above entitled matter. I have read the foregoing Petition to Compel Accounting and Final Distribution and know the contents thereof. The same is true of my own knowledge except as to matters which are stated on my information and belief, and as to those matters I believe it to be true.

Executed on March 15, 1983 at 232 N. Canon Dr., Beverly Hills, California under penalty of perjury.

/s/ Patrick Newsom

APPENDIX EE

The Annexed Instrument
is a Correct Copy of the
Original On File In My Office
Attest-Certified January 4, 1989
By Uranie Fung
Deputy Clerk

Brennan J. Newsom
950 Battery Street
Suite 300 A
San Francisco, California 94111
Telephone: (415) 421-7876

Shiver & Stadum
505 Sansome Street
Suite 1100
San Francisco, California 94111
Telephone: (415) 956-2400

Attorneys for Executor

California Superior Court

City and County of San Francisco

[Filed May 17, 1983]

No. 217391

In the Matter of the Estate of:

William A. Newsom, Deceased.

Hearing Date:
May 23, 1983

Amended Final Account and Report and
Petition for Final Distribution
and for Allowance of Compensation
for Extraordinary Services

Petitioner, William A. Newsom, Jr., personal representative of the Estate of Christine A. Newsom, deceased, requests orders approving the following Amended Final Account and Report, and

for final distribution of this Estate, which incorporates and modifies the original Final Account and Report and Petition, etc., filed April 12, 1983, as amended, and alleges:

* * *

14. Statutory Compensation: Compensation to petitioner for his ordinary services as executor and for the ordinary services of Brennan J. Newsom, Esq., attorney for petitioner, is computed as set forth in Attachment One, Schedule 5. As further described in Attachment One, Schedule 6, and by the separate Petition regarding ordinary and extraordinary commissions and fees attached hereto as Attachment Two after crediting all payments received on account of commissions and fees for ordinary services, and debiting all payments to others retained to provide or assist in providing such ordinary services, the balance of compensation due for ordinary services is as follows:

a. For petitioner, as personal representative, total commissions allowed of $18,530.05, less $10,850.00 previously received on account, for a balance presently due of $7,680.05.

b. For petitioner's attorney, total fees allowed $18,530.05, less $10,202.95 previously received on account or debited for payments on account to others, for a balance due of $8,327.10.

15. Compensation for Extraordinary Services: The accompanying Petition attached as Attachment Two describes the extraordinary services performed for the Estate over a period in excess of five (5) years by petitioner as the personal representative, and by Brennan J. Newsom, Esq. as petitioner's attorney.

* * *

Petitioner therefore requests the following compensation for extraordinary services:

a. For petitioner, the amount of $16,700.00 for his commissions for his extraordinary services as described in Attachment Two.

b. For petitioner's attorney, the amount of $15,400.00 as the balance due for fees for his extraordinary services, after the setoffs described above, as also set forth in Attachment Two.

* * *

19. Proposed Final Distribution: Pursuant to the terms of the will of the decedent admitted to probate herein, and subject to the waiver of Carole Ann Onorato described in paragraph 10 of this Petition, above, the balance of the Estate on hand as shown in the Final Account and Report should be distributed as set forth in Attachment One, Schedule 8.

Wherefore, petitioner prays for judgment and orders as follows:

* * *

4. That the following amounts be ordered paid from the residue of the Estate on account of the balances due for ordinary and extraordinary fees and commissions:

a. To petitioner, as the balance due on his ordinary commissions, the sum of $7,680.05;

b. To petitioner's attorney, as the balance due on ordinary fees, the sum of $8,327.10;

c. To petitioner, as commissions for his extraordinary services, the sum of $16,700.00;

d. To petitioner's attorney, as the net balance of fees for his extraordinary services, the sum of $15,400.00; and

5. for all other proper orders.

Dated: May 10, 1983.

/s/ William A. Newsom, Jr.
William A. Newsom, Jr.
Petitioner

Brennan J. Newsom
Shiver & Stadum

By /s/ Brennan J. Newsom
Attorneys for Petitioner

Verification

I, William A. Newsom, Jr., declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed at San Francisco, California, on May 10, 1983.

/s/ William A. Newsom
William A. Newsom

APPENDIX FF

The Annexed Instrument
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Original on File in My Office
Attest-Certified January 4, 1989
By Uranie Fung
Deputy Clerk

Brennan J. Newsom
950 Battery Street
Suite 300 A
San Francisco, California 94111
Telephone: (415) 421-7876

Shiver & Stadum
505 Sansome Street
Suite 1100
San Francisco, California 94111
Telephone: (415) 956-2400

Attorneys for Executor

California Superior Court
City and County of San Francisco

[Filed May 17, 1983]

No. 217391

In the Matter of
the Estate of:

William A. Newsom,
Deceased.

Declaration of Executor Regarding
Extraordinary Services
[Probate Code § 902]

Petitioner, as the only duly-appointed and serving Executor for the above-named Estate, has rendered to the Estate during the pendency of these probate proceedings extraordinary services of

the nature described in Section 902 of the Probate Code, the summary details of which are set forth below.

The above-entitled Estate proceeding and that of In the Matter of the Estate of Christine A. Newsom, deceased, California Superior Court, City and County of San Francisco, Probate No. 223586, are interrelated. The decedents were the parents of the Petitioner and Executor. The extraordinary services performed, detailed below, were from their nature substantially performed concurrently in both such Estates. Therefore, while the total approximate hours required for such services are set forth without allocation, the compensation requested for such conjoint services has been allocated evenly between the two Estates, and thus only one-half thereof is requested in this particular proceeding, as such efforts were devoted for all practical purposes equally as between the two Estates, and no other more practical allocation is appropriate:

Nature of Services Requested	Fee
1. Participation both as representative and as a party in extended litigation involving Estate from April, 1980, to June, 1981, arising out of alleged overbid in November, 1979, by K. Frankel and Earth & Shelter Realty, concerning interest of Estate in real property at Nicasio, Marin County, California, and previous agreement of sale for interest of Estate to Mr. and Mrs. C. Rawnsley as original bidders; involving periodic participation in discovery, including personal deposition and document production for entire day, ongoing consultations with special counsel, meetings with parties in settlement negotiations; supervising successful efforts to settle separate action against Estate and others brought by Rawnsleys in Marin County Superior Court; review and execution of various documents involved in both litigation proceedings. Total services consumed approximately 100 hours over 19 months.	$ 3,000

Nature of Services Requested	Fee
2. Supervision of original purchases and subsequent profitable sales of real property interests in Nicasio, Marin County (separate from litigation described in paragraph 1, above); including travel for and numerous meetings (seven (7) for one particular sale alone) with counsel, real estate brokers, prospective buyers; review and execution of necessary documents, other involvement in sales negotiations. Total services required approximately 100 hours over period in excess of three (3) years.	$ 1,500
3. Supervision of renegotiation of prior sale and land security as to one of the sales of Estate interests in real property at Nicasio, Marin County, California, in 1981; supervise collection of purchase money obligations from sales and discussions about possible adjustments; related conferences with counsel, accountants, other parties involved, real estate brokers. Total services required approximately 15 hours.	$ 750
4. Supervision of recent steps taken to protect Estate's interest in secured note obligation on part of Nicasio real property (see paragraphs 2 and 3, above) after purchasers/borrowers' present default in final installment payment on December 15, 1982; including collection of and review of documents, consultation with counsel, accountant for Estate, real estate broker, deed of trust trustee. Total services to date have required approximately 10 hours. (Allocation as to other interests separate from Estate.)	$ 500
5. Conference (approximately five (5) separate meetings) with accountants and counsel for Estate in connection with preparation and audit of federal estate tax return and determination of Estate's tax liabilities, including consultations over negotiation of value of decedent's interest in closely-held corporation, review of counsel's documents setting forth positions, counsel's negotiations with the Internal Revenue Service (involving resultant tax savings). Total services required approximately 12 hours.	$ 600

Nature of Services Requested	Fee
6. Various personal conferences, telephone conferences, correspondence, consultation with counsel for Estate, in collection and allocations of obligations owed to Estate; resolving disputes concerning such obligations; supervising allocations of receipts among Estate and others involved, with related communications with other parties, counsel for Estate, and accountant for Estate, over such matters. Total services over several years at various times have required approximately 40 hours. (Allocation as to other interests, separate from those Estate.)	$ 2,000
7. Negotiations; related conferences, telephone communications, correspondence, review of documents, with and between heirs on obligations involved with closely-held real estate investment corporation involving Estate, and various heirs individually, bank loans, renunciation of a [sic] heir's interest in Estate in partial resolution of certain aspects of such obligations and disputes over them. Total services over serveral [sic] years have required approximately 30 hours. (Allocated as to other interests, separate from those of Estate.)	$ 1,500
8. Conferences with counsel, special tax counsel, and accountants for Estate, on determination of decedent's personal income tax liabilities and the fiduciary income tax liability of Estate; review of returns prepared, review of negotiations with the Internal Revenue Service. Total services required approximately 15 hours over a number of months.	$ 750
9. Consultations with accountant for estate and other accountants, counsel, tax counsel concerning Estate's interest in closely-held real estate investment corporation; adjustments of obligations between Estate and corporation, and individual interests of heirs; review and execute various related documents. Total services required approximately 20 hours for period in excess of two years.	$ 1,000

Nature of Services Requested	Fee
10. Conferences, meetings, travel (three (3) separate conferences at Tahoe City CA alone) in connection with improvements to, marketing of property at Alpine Meadows CA; including conferences with counsel, accountant, contractor's representatives, in settlement of construction in lien disputes; handling sucessful [sic] profitable sale of property, meetings with prospective buyers and real estate brokers. Total services required approximately 40 hours.	$ 2,000
11. Conferences and meetings in settlement of disputes concerning well spring drilling equipment (as to interests of Estate); successfully arranged for sale equipment (allocation as to other interests, separate from Estate). Allocated services of approximately 10 hours.	$ 500
12. Conferences, meetings, consultation with special counsel for Estate, dealing directly with property owners, in connection with foreclosure of security on property in Truckee, CA, including full-day settlement negotiations in Truckee, CA. (Allocated as to other interests.) Total allocated services of approximately 12 hours.	$ 600
13. Conferences, meetings, consultations with legal counsel, on renegotiation of security foreclosure on property in Sierra City, CA; meetings with debtors from San Jose, CA; handling advertising of sale; meetings with prospective buyers, real estate brokers; meetings with tax counsel on tax consequences of renegotiated debt, sale, to Estate. Total services required approximately 40 hours.	$ 2,000
Total	$16,700

I, William A. Newsom, Jr., the Petitioner and Executor in the above-entitled proceeding, declare under penalty of perjury under the laws of California that I have read the foregoing schedule and summary description of extraordinary services performed by me as the duly-appointed and serving personal representative of the above-named Estate, and that the same is true and correct.

Executed at San Francisco, California, on May 10, 1983.

/s/ William A. Newsom, Jr.
William A. Newsom, Jr.

APPENDIX GG

The Annexed Instrument
Is a Correct Copy Of The
Original On File In My Office
Attest-Certified January 4, 1989
By Uranie Fung
Deputy Clerk

Brennan J. Newsom
950 Battery Street, Suite 300 A
San Francisco, California 94111
Telephone: (415) 421-7876

Shiver & Stadum
505 Sansome Street, Suite 1100
San Francisco, California 94111
Telephone: (415) 956-2400
Attorneys for Executor

California Superior Court
City And County Of San Francisco

[Filed May 23, 1983]

No. 217391

In the Matter of
the Estate of:
William A. Newsom,
Deceased.

Stipulation For Waiver of
Extraordinary Commissions and
Fees and of Objections to
Amended Final Account

It is hereby Stipulated between Edwin C. Shiver, Esq., Shiver & Stadum, counsel of record for William A. Newsom, Jr., and Brennan J. Newsom, executor and attorney for executor in the above-entitled estate and also two of the five distributive heirs thereof, and David H. Melnick, Esq., Leland, Parachini, Stein-

berg, Flinn, Matzger & Melnick, counsel of record for Barbara Newsom, Sharon Mohun, and Patrick Newsom, the remaining distributive heirs of the above-entitled estate, as follows:

1. William A. Newsom, Jr., as executor, and Brennan J. Newsom, as his counsel, hereby waive in their entireties their respective applications for allowance and payment to them of any commissions or fees for extraordinary services to the estate, thereby agreeing that the judgment or order of this court for the final distribution of this estate shall not award any such extraordinary commissions or fees whatsoever.

2. Subject to the following proviso, the distributive heirs agree that the amended final account filed herein may be submitted to the court for confirmation and settlement, without objection from any such distributive heirs; provided, that because he is travelling outside the United States, counsel for Patrick Newsom has been unable to contact such heir to confirm that such heir has no objection to such account; and, provided further, that the executor represents that he spoke with Patrick Newsom by international telephone on May 18, 1983, and that Patrick Newsom stated that he would adopt the position of his co-heir and sister, Barbara Newsom. As stated above, pursuant to this Stipulation Barbara Newsom interposes no objections to such account.

3. Counsel for the executor shall submit to the court a modified form of proposed Judgment Settling Amended Final Account, etc., and Order for Final Distribution, in the form attached as Exhibit A, to reflect the waivers contained in paragraph 1 above. Execution of this Stipulation by counsel for Barbara Newsom, Sharon Mohun, and Patrick Newsom shall not signify their confirmation or verification of any of the matters stated by the executor in the Amended Final Account and Report, etc., and Petition for Final Distribution, etc., or the original Final Account and Report, etc., filed in this proceeding, or approval of the contents of Exhibit A hereto except as to form; but, shall be limited to the matters set forth in paragraph 2 of this Stipulation, preceding, as therein qualified.

Dated: May 20, 1983.

Shiver & Stadum
Edwin C. Shiver

By /s/ Edwin C. Shiver
Edwin C. Shiver, Esq.

Attorneys William A. Newsom, Jr.
and Brennan J. Newsom

Leland, Parachini, Steinberg,
Flinn, Matzger & Melnick

By /s/ David H. Melnick
David H. Melnick, Esq.

Attorneys for Barbara Newsom,
Sharon Mohun, and Patrick
Newsom

APPENDIX HH

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Telephone: (415) 956-2400

Attorneys for Executor

California Superior Court
City and County of San Francisco

[Filed May 23, 1983]

No. 217391

In the Matter of the Estate of:

William A. Newsom,
Deceased.

Judgment Settling Amended Final
Account and Report of Executor and
Order for Final Distribution

William A. Newsom, Jr., as executor of the estate of the above-named decedent, having filed his amended final account, report, and petition for its settlement and for final distribution, and the amended account, report, and petition for final distribution com-

ing on May 23, 1983 regularly for hearing in the Probate Department of the above-entitled Court, the Court finds as follows:

* * *

14. The executor and the attorney for the executor have each waived their respective applications for additional compensation for extraordinary services. Therefore, no extraordinary commissions shall be paid to the executor and no extraordinary fees shall be paid to the attorney for the executor.

* * *

Dated: May 23, 1983.

/s/ William E. Mullins
William E. Mullins
Judge of the Superior Court

APPENDIX II

Placer County Recorder's General Index
Grantors and Grantees
N 13
Date 12 31 1976 Page 105
Year-To-Date

Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
318147	11/16/73	E	Newsom William A Jr	Bartlett Mary Louise	Deed	30994	01533	351
318151	11/16/73	E	Newsom William A Jr	Blackwell Donald M	Deed	30995	01533	353
318155	11/16/73	E	Newsom William A Jr	Blackwell Neysa	Deed	30995	01533	353
318159	11/16/73	E	Newsom William A Jr	Blackwell Clifta G	Deed	30996	01533	355
318163	11/16/73	E	Newsom William A Jr	Blackwell Marion J	Deed	30996	01533	355
318166	11/16/73		Newsom William A Jr	Blackwell Clifta G	Trust Deed	30997	01533	356
318168	11/16/73		Newsom William A Jr	Blackwell Marion J	Trust Deed	30997	01533	356
318174	11/16/73		Newsom William A Jr	Bartlett Everett P	Trust Deed	30998	01533	358
318176	11/61/73		Newsom William A Jr	Bartlett Mary Louise	Trust Deed	30998	01533	358
318182	11/61/73		Newsom William A Jr	Blackwell Donald M	Trust Deed	30999	01533	360
318184	11/16/72		Newsom William A Jr	Blackwell Neysa	Trust Deed	30999	01533	360
448737	09/11/74		Newsom William A Jr	Sabre Motamedi Farama	Deed	23531	01592	244
448740	09/11/74	E	Newsom William A Jr	Motamedi Fred S	Deed	23532	01592	245
448741	09/11/74		Newsom William A Jr	Harvey David Thomas	Deed	23533	01592	246
448743	09/11/74		Newsom William A Jr	Harvey Judith Louise	Deed	23533	01592	246
448746	09/11/74	E	Newsom William A Jr	Harvey David Thomas	Trust Deed	23534	01592	247
448748	09/11/74	E	Newsom William A Jr	Harvey Judith Louise	Trust Deed	23534	01592	247
448749	09/11/74		Newsom William A Jr	Spence Arlene J	Asgt Tr Deed	23535	01592	248

(Continued on following page)

(Continued from previous page)

Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
448751	09/11/74		Newsom William A Jr	Spence Clarence	Asgt Tr Deed	23535	01592	248
452720	09/18/74	E	Newsom William A Jr		Reconveyance	24321	01594	003
583138	07/23/75		Newsom William A Jr	Bullock E D Prtn	Abst Judg	18264	01655	587
583140	07/23/75		Newsom William A Jr	Bullock Virginia M Prtn	Abst Judg	18264	01655	587
583142	07/23/75		Newsom William A Jr	National Mercantile Agc	Abst Judg	18264	01655	587
815794	09/28/76	E	Newsom William A Jr		Reconveyance	31097	01766	387
815796	09/28/76	E	Newsom William A Jr		Reconveyance	31098	01766	388
840277	11/02/76	E	Newsom William A Jr	Harvey David Thomas	Trust Deed	35976	01777	641
840279	11/02/76	E	Newsom William A Jr	Harvey Judith Louise	Trust Deed	35976	01777	641
848077	11/16/76		Newsom William A Jr	Cal St Benefit Payments	Tax Lien	37609	01781	541

Placer County Recorder's General Index
Grantors and Grantees
N 12
Date 12 31 1979 Page 10,092
Year-To-Date

Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
186162	09/21/77		Newsom William	Placer Cou	Satif P P Tax	36588	01888	022
186164	09/21/77		Newsom William	Placer Cou	Satif P P Tax	36589	01888	023
235286	11/23/77		Newsom William	Placer Cou	Judg P P Tax	47049	01913	216
235288	11/23/77		Newsom William	Placer Cou	Judg P P Tax	47050	01913	217
547841	01/02/79		Newsom William	Placer Cou	Judg P P Tax	00486	02069	486
547847	01/02/79		Newsom William	Placer Cou	Judg P P Tax	00488	02069	488
686092	07/02/79		Newsom William	Placer Cou	Satif P P Tax	28373	02140	590
731631	08/28/79		Newsom William		Req Nt Dflt	37036	02163	022
793460	11/08/79		Newsom William	Placer Cou	Judg P P Tax	49329	02193	327
011608	01/21/77	E	Newsom William A		Reconveyance	02408	01802	327
017600	01/31/77		Newsom William A	Williams Lithograph Co	Satif Judg	03625	01805	212
044176	03/14/77	E	Newsom William A		Reconveyance	08557	01817	060
081684	05/09/77		Newsom William A	Central Cal Fed S&L Asn	Nt Default	16310	01838	053
182432	09/16/77		Newsom William A	Merle Nancy M	Deed	35786	01885	700
182434	09/16/77		Newsom William A	Merle William E	Deed	35786	01885	700
182436	09/16/77		Newsom William A	Twardus George L	Deed	35786	01885	700
182438	09/16/77		Newsom William A	Twardus Jo Anne T	Deed	35786	01885	700
182457	09/16/77	E	Newsom William A	Merle Nancy M	Trust Deed	35789	01886	007
182459	09/16/77	E	Newsom William A	Merle William E	Trust Deed	35789	01886	007

(Continued on following page)

(Continued from previous page)

Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
182461	09/16/77	E	Newsom William A	Twardus George L	Trust Deed	35789	01886	007
182463	09/16/77	E	Newsom William A	Twardus Jo Anne T	Trust Deed	35789	01886	007
182465	09/16/77		Newsom William A		Req Nt Dflt	35790	01886	009
182466	09/16/77	E	Newsom William A		Reconveyance	35791	01886	010
182468	09/16/77	E	Newsom William A	Central Cal Fed S&L Asn	Rel Asgt Rent	35792	01886	011
197994	10/06/77	E	Newsom William A	O Leary Mary Mabel Tr	Deed	38938	01893	495
197998	10/06/77	E	Newsom William A	O Leary Mary Mabel Tr	Deed	38938	01893	495
198001	10/06/77		Newsom William A	Placer S&L Assn	Trust Deed	38939	01893	497
199314	10/07/77		Newsom William A	Improvement Corp	Trust Deed	39257	01894	277

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Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
240458	12/02/77	E	Newsom William A	Rush James M Jr	Deed	48242	01915	658
240460	12/02/77	E	Newsom William A	Rush James M Sr	Deed	48242	01915	658
240462	12/02/77	E	Newsom William A	Rush James Michael Jr	Deed	48242	01915	658
240464	12/02/77	E	Newsom William A	Rush Vivian M	Deed	48242	01915	658
273073	01/18/78		Newsom William A	Placer S&L Assn	Trust Deed	02242	01932	088
289069	02/09/78		Newsom William A	Merle Nancy M	Deed	05389	01939	553
289071	02/09/78		Newsom William A	Merle William E	Deed	05389	01939	553
289073	02/09/78		Newsom William A	Twardus George L	Deed	05389	01939	553
289075	02/09/78		Newsom William A	Twardus Jo Anne T	Deed	05389	01939	553
425151	08/01/78	E	Newsom William A	Costantini Gloria L	Deed	31989	02007	230
425153	08/01/78	E	Newsom William A	Costantini Ottorino	Deed	31989	02007	230
425154	08/01/78		Newsom William A	Costantini Gloria L	Trust Deed	31990	02007	233
425156	08/01/78		Newsom William A	Costantini Ottorino	Trust Deed	31990	02007	233
425158	08/01/78		Newsom William A	Young S Elizabeth	Trust Deed	31991	02007	235
425160	08/01/78		Newsom William A	Young Samuel P	Trust Deed	31991	02007	235
627094	04/18/79		Newsom William A	Hofheimer Martha Est	Trust Deed	16344	02109	238
199316	10/07/77		Newsom William A Jr	Improvement Corp	Trust Deed	39257	01894	277
266357	01/10/78		Newsom William A Jr	Squaw Vly Impvt Corp	Trust Deed	01093	01929	205
432784	08/10/78		Newsom William A Jr	O Neal Raymond	Deed	33476	02010	685
731634	08/28/79		Newsom William A Jr		Req Nt Dflt	37037	02163	024

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Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
358460	03/20/80		Newsom Brennan John	Placer S&L Assn	Nt Default	11031	02238	035
300411	05/16/80		Newsom Brennan John	Placer S&L Assn	Cnc Nt Dflt	18850	02258	243
347657	03/24/81	E	Newsom Brennan J	Onorato Carole Anne	Deed	10887	02369	676
347661	03/24/81	E	Newsom Brennan J	Onorato F E	Deed	10887	02369	676
347665	03/24/84	E	Newsom Brennan J	Onorato Frederick E	Deed	10887	02369	676
368405	04/16/81	E	Newsom Brennan J	All Persons Unknown	Nt Pend	14514	02379	003
368409	04/16/81	E	Newsom Brennan J	Bank of Amer	Nt Pend	14514	02379	003
368413	04/16/81	E	Newsom Brennan J	Continental Aux Co	Nt Pend	14514	02379	003
368417	04/16/81	E	Newsom Brennan J	Phillips Morris	Nt Pend	14514	02379	003
368421	04/16/81	E	Newsom Brennan J	West Victor C	Nt Pend	14514	02379	003
368425	04/16/81	E	Newsom Brennan J	Wright Richard R	Nt Pend	14514	02379	003
664711	05/28/82	E	Newsom Brennan J	Phillips Morris E Jr	Deed	19559	02503	003
058462	03/20/80		Newsom Patricia	Placer S&L Assn	Nt Default	11031	02238	035
000413	05/16/80		Newsom Patricia	Placer S&L Assn	Cnc Nt Dflt	18850	02258	243
277201	12/23/80		Newsom William	Placer Cou	Satif P P Tax	50627	02339	450

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Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
277203	12/23/80		Newsom William	Placer Cou	Satif P P Tax	50628	02339	451
277205	12/23/80		Newsom William	Placer Cou	Satif P P Tax	50629	02339	452
277207	12/23/80		Newsom William	Placer Cou	Satif P P Tax	50630	02339	453
641510	14/23/82		Newsom William	Placer Cou	Judg P P Tax	14913	02495	005
162722	08/15/80		Newsom William A	Placer S&L Assn	Nt Default	30103	02287	543
195376	09/24/80		Newsom William A		Req Nt Dflt	36027	02303	069
248020	11/20/80	E	Newsom William A	National Mercantile Agc	Req Dsmsl	45543	02326	232
263298	12/10/80		Newsom William A	Bank of Amer	Trust Deed	48449	02333	423
269763	12/18/80	E	Newsom William A		Reconveyance	49630	02336	540
303086	01/26/81		Newsom William A	Placer S&L Assn	Cnc Nt Dflt	03152	02351	167
347659	03/24/81	E	Newsom William A	Onorato Carole Anne	Deed	10887	02369	676
347663	03/24/81	E	Newsom William A	Onorato F E	Deed	10887	02369	676
347667	03/24/81	E	Newsom William A	Onorato Frederick E	Deed	10887	02369	676
668192	06/04/82	E	Newsom William A		Reconveyance	20223	02504	278
668213	06/04/82		Newsom William A		Req Nt Dflt	20227	02504	286
669376	06/08/82		Newsom William A	Newsom William A	Deed	20456	02504	711
669377	06/08/82	E	Newsom William A	Newsom William A	Deed	20456	02504	711
669378	06/08/82		Newsom William A	Scherer Anne	Deed	20456	02504	711
669380	06/08/82		Newsom William A	Scherer Paul R	Deed	20456	02504	711
698979	07/23/82	E	Newsom William A		Reconveyance	26557	02515	779
263297	12/10/80	E	Newsom William A Jr		Reconveyance	48448	02333	422
668166	06/04/82	E	Newsom William A Jr		Reconveyance	20222	02504	276

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Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
554	01/05/83		Newsom Brennan J		Nt Tr Sale	00532	02554	995
933	01/24/83		Newsom Brennan J	Newsom William A Jr	Deed	03044	02559	442
450	11/10/83	E	Newsom Brennan J	Shimmon Michael W	Deed	43941	02639	751
456	11/10/83	E	Newsom Brennan J	Newsom Franza Giffen	Deed	43942	02639	752
457	11/10/83		Newsom Brennan J	Benevest Mtg Co	Trust Deed	43943	02639	753
224	01/13/84	E	Newsom Brennan J	Wright Richard R	Judg By Dflt	01553	02657	783
784	05/15/84	E	Newsom Brennan J	All Persons Unknown	Nt Pend	18782	02693	962
788	05/15/84	E	Newsom Brennan J	Bank of Amer	Nt Pend	18782	02693	962
792	05/15/84	E	Newsom Brennan J	Contintental Aux Co	Nt Pend	18782	02693	962
796	05/15/84	E	Newsom Brennan J	Davids John J	Nt Pend	18782	02693	962
800	05/15/84	E	Newsom Brennan J	Recreational Invests Co	Nt Pend	18782	02693	962
804	05/15/84	E	Newsom Brennan J	West Victor C	Nt Pend	18782	02693	962
808	05/15/84	E	Newsom Brennan J	Wright Richard R	Nt Pend	18782	02693	962
644	06/12/85	E	Newsom Brennan J	Continental Aux Co	Judgment	21237	02821	122
648	06/12/85	E	Newsom Brennan J	Davids John J	Judgment	21237	02821	122
652	06/12/85	E	Newsom Brennan J	Recreational Invests Co	Judgment	21237	02821	122
656	06/12/85	E	Newsom Brennan J	West Victor C	Judgment	21237	02821	122
660	07/12/85	E	Newsom Brennan J	Wright Richard	Judgment	21237	02821	122
455	11/10/83		Newsom Franza Giffen	Newsom Brennan J	Deed	43942	02639	752
524	11/28/83		Newsom Ginella	Squaw Vly Cou Water Dst	Lien	45971	02643	629
924	03/12/84	E	Newsom Ginella	Squaw Vly Cou Water Dst Req Dsml	Lien	09326	02673	711

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Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
935	01/24/83		Newsom Franza Giffen	Newsom William A Jr	Deed	03044	02559	442
3073	09/04/85	E	Newsom Patrick J	Newsom William A	Deed	33822	02859	634
205	05/08/84		Newsom Robert J	Phipps Dorothe A	Asgt Tr D	17756	02691	757
207	05/08/84		Newsom Robert J	Phipps Raymond D	Asgt Tr D	17756	02691	757
5656	12/10/84		Newsom William	Ginella Tom	Deed	49384	02759	626
5825	11/06/85	E	Newsom William	Nencini Cesare M	Nt Int Sale	43296	02888	258
095	12/03/85	E	Newsom William	Nencini Cesare M	Nt Int Sale	46837	02899	050
2555	01/05/83		Newsom William A		Nt Tr Sale	00532	02554	995
0961	12/02/83		Newsom William A	Cal St Franchise Tax	Tax Lien	46947	02645	644
4946	03/23/84	E	Newsom William A	Cal St Franchise Tax	Rel Lien	11160	02677	341
9097	07/11/84	E	Newsom William A		Reconveyance	27128	02712	905
3233	07/03/85	E	Newsom William A	Bfr Assocs Ptp	Deed	24608	02831	525
3235	07/03/85	E	Newsom William A	Fulton Arthur D Prtn	Deed	24608	02831	525
3236	07/03/85		Newsom William A	Bfr Assocs Ptp	Trust Deed	24609	02831	526
3072	09/04/85		Newsom William A	Newsom Patrick J	Deed	33822	02859	634
934	01/24/83	E	Newsom William A Jr	Newsom Brennan J	Deed	03044	02559	442
936	01/24/83	E	Newsom William A Jr	Newsom K Franza Giffen	Deed	03044	02559	442
4097	12/03/85	E	Newsom William Prtn	Nencini Cesare M	Nt Int Sale	46837	02899	050

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Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
338	03/23/87	E	Newsom William	Ginella Tom	Trust Deed	16757	03152	520
677	12/05/86	E	Newsom William A		Reconveyance	56281	03087	302
455	12/23/86		Newsom William A	Cal St Franchise Tax	Tax Lien	60193	03099	399
419	02/20/87	E	Newsom William A		Reconveyance	10822	03135	176
132	02/27/87	E	Newsom William A	Cal St Franchise Tax	Rel Lien	12515	03140	353
266	06/09/87		Newsom William A		Nt Tr Sale	32792	03204	025
983	06/17/87		Newsom William A	Scherer Anne	Deed	34862	03210	124
985	06/17/87		Newsom William A	Scherer Paul	Deed	34862	03210	124
267	06/09/87		Newsom William A Jr		Nt Tr Sale	32792	03204	025
116	04/06/87	E	Newsom William Prtn	Chazen Lawrence Inc Prt	Nt Int Sale	19482	03162	001
132	04/06/87	E	Newsom William Prtn	Chazen Lawrence Prtn	Nt Int Sale	19482	03172	001
148	04/06/87	E	Newsom William Prtn	Cncml Ptp	Nt Int Sale	19482	03162	001
164	04/06/87	E	Newsom William Prtn	Getty Gordon P Prtn	Nt Int Sale	19482	03162	001
180	04/06/87	E	Newsom William Prtn	Leland Marc Prtn	Nt Int sale	19482	03162	001

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Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
196	04/06/87	E	Newsom William Prtn	Mohun Robert Prtn	Nt Int Sale	19482	03162	001
197	04/06/87		Newsom William Prtn	Chazen Lawrence Inc Prt	Nt Int Sale	19482	03162	001
199	04/06/87		Newsom William Prtn	Chazen Lawrence J Prtn	Nt Int Sale	19482	03162	001
201	04/06/87		Newsom William Prtn	Cncml Ptp	Nt Int Sale	19482	03162	001
203	04/06/87		Newsom William Prtn	Getty Gordon P Prtn	Nt Int Sale	19482	03162	001
205	04/06/87		Newsom William Prtn	Goletto Gordon Prtn	Nt Int Sale	19482	03162	001
207	04/06/87		Newsom William Prtn	Leland Marc Prtn	Nt Int Sale	19482	03162	001
209	04/06/87		Newsom William Prtn	Mohun Robert Prtn	Nt Int Sale	19482	03162	001
211	04/06/87		Newsom William Prtn	Newsom William Prtn	Nt Int Sale	19482	03162	001
212	04/06/87	E	Newsom William Prtn	Newsom William Prtn	Nt Int Sale	19482	03162	001

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Account Number	Date Filed		Grantor, Grantee, Etc. (E) Denotes Grantee	Cross Reference Name	Title	Series Number	Book	Page
089204	04/24/86	E	Cncml Ptp	Jensen Robert A	Deed	17184	02961	568
089209	04/24/86		Cncml Ptp	Wells Fargo Bk	Subdn Agm	17185	02961	571
089223	04/24/86		Cncml Ptp	Wells Fargo Bk	Trust Deed	17186	02961	577
296462	12/11/86	E	Cncml Ptp	Jensen Robert A	Deed	57433	03091	123
413106	04/06/87	E	Cncml Ptp	Chazen Lawrence Inc Prt	Nt Int Sale	19482	03162	001
413122	04/06/87	E	Cncml Ptp	Chazen Lawrence J Prtn	Nt Int Sale	19482	01632	001
413133	04/06/87		Cncml Ptp	Chazen Lawrence Inc Prt	Nt Int Sale	19482	03162	001
413135	04/06/87		Cncml Ptp	Chazen Lawrence J. Prtn	Nt Int Sale	19482	03162	001
413137	04/06/87		Cncml Ptp	Cncml Ptp	Nt Int Sale	19482	03162	001
413138	04/06/87	E	Cncml Ptp	Cncml Ptp	Nt Int Sale	19482	03162	001
413139	04/06/87		Cncml Ptp	Getty Gordon P Partn	Nt Int Sale	19482	03162	001
413141	04/06/87		Cncml Ptp	Goletto Gordon Prtn	Nt Int sale	19482	03162	001
413143	04/06/87		Cncml Ptp	Leland Marc Prtn	Nt Int Sale	19482	03162	001
413145	04/06/87		Cncml Ptp	Mohun Robert Prtn	Nt Int Sale	19482	03162	001
413147	04/06/87		Cncml Ptp	Newsom William Prtn	Nt Int Sale	19482	03162	001
413154	04/06/87	E	Cncml Ptp	Getty Gordon P Prtn	Nt Int Sale	19482	03162	001
413170	04/06/87	E	Cncml Ptp	Leland Marc Prtn	Nt Int Sale	19482	03162	001
413186	04/06/87	E	Cncml Ptp	Mohun Robert Prtn	Nt Int Sale	19482	03162	001
413202	04/06/87	E	Cncml Ptp	Newsom William Prtn	Nt Int Sale	19482	03162	001
551067	08/21/87		Cncml Ptp	Placer Cou	Easement	47762	03251	152

APPENDIX JJ

Placer County

39257

Official Records Placer County-Calif.
Record requested by
Brennan J. Newsom

Oct 7 2:23 PM 1977

Maurine I. Dobbas
County Recorder

39257 $4.00

Recording requested by and when recorded mail to

Brennan J. Newsom
1015 Battery Street
San Francisco, CA 94111

Short Form Deed of Trust and
Assignment of Rents

This deed of trust, made this 6th day of October, 1977, between William A. Newsom, Jr. and Glen Englund, herein called Trustor, whose address is 640 North Lake Boulevard, Tahoe City, California, Trustors Security Service, a California corporation, herein called Trustee, and Squaw Valley Improvement Corporation, a California corporation, herein called Beneficiary,

Witnesseth: That Trustor irrevocably grants, transfers and assigns to Trustee in trust, with power of sale, that property in Tahoe City, Placer County, California, described:

more particularly on Exhibit A attached hereto and incorporated herein.

* * *

For the Purpose of Securing:

1. Performance of each agreement of Trustor incorporated by reference or contained herein. 2. Payment of the

indebtedness evidenced by one promissory note of even date herewith, and any extension or renewal thereof, in the principal sum of $7,500.00 granted by Trustor in favor of Beneficiary or order.

* * *

Signature of Trustor

/s/ William A. Newsom, Jr.
William A. Newsom, Jr.

/s/ Glen Englund
Glen Englund

STATE OF CALIFORNIA }
COUNTY OF PLACER } ss.:

On Oct. 6, 1977 before me, the undersigned, a Notary Public in and for said State, personally appeared William A. Newsom Jr., known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal)

Signature /s/ A. P. Fellner
A. P. Fellner

Notary Public in and for said State

Official Seal
A. P. Fellner
Notary Public—California

94-090-07

Placer County

STATE OF CALIFORNIA }
COUNTY OF PLACER } ss.:

On October 6, 1977 before me, the undersigned, a Notary Public in and for said State, personally appeared Glen Englund known to me to be the person whose name is subscribed to the within instrument and acknowleged to me that he executed the same.

Witness my hand and official seal.

Signature: /s/ A. P. Fellner
A. P. Fellner

Notary Public in and for said State

Official Seal
A. P. Fellner
Notary Public—California

APPENDIX KK

Placer County

1093

Official Records
Placer County-Calif.
Record requested by

Thomas Haute

Jan. 10, 2:32 P.M. '78

Maurine I. Dobbas
County Recorder

1093 $3.00

Recording Requested By

Squaw Valley Improvement Corp.
1015 Battery Street
San Francisco, CA 94111

and when recorded mail to

Brennan J. Newsom
1015 Battery Street
San Francisco, CA 94111

Short Form Deed of Trust
and Assignment of Rents

This Deed of Trust, made this 1st day of December, 1977, between William A. Newsom, Jr., herein called Trustor, whose address is Placer County Courthouse, Auburn, California, Trustors Security Service, a California corporation, herein called Trustee, and Squaw Valley Improvement Corporation, a California corporation, herein called Beneficiary,

Witnesseth: That Trustor Irrevocably Grants, Transfers and Assigns to Trustee in Trust, With Power of Sale, that property in Placer County, California, described as:

Unincorporated area. Lot 7, Block 5 as per map of the "Town of Ducth Flat:, filed June 12, 1871, in Book "C" of Maps, page 6, Placer County Records.

* * *

For the Purpose of Securing:

1. Performance of each agreement of Trustor incorporated by reference or contained herein. 2. Payment of the indebtedness evidenced by one promissory note of even date herewith, and any extension or renewal thereof, in the principal sum of $5,324.00 executed by Trustor in favor of Beneficiary or order.

* * *

Signature of Trustor

/s/ William A. Newsom, Jr.
William A. Newsom, Jr.

STATE OF CALIFORNIA }
COUNTY OF PLACER } ss.:

On 20th December 1977 before me, the undersigned, a Notary Public in and for said State, personally appeared William A. Newsom, Jr., known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

Witness my hand and official seal.
(Seal)

Signature /s/ Nancy Birge
[Seal]
Notary Public in and for said State

Official Seal
Nancy Birge
Notary Public—California

62-081-03

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APPENDIX LL

Placer County
48449
Official Records Requested By
First American Title Co.
Dec 10 9:11 AM '80

Gay Trombley
Placer Co Recorder
48449 $5.00

73782
Submitted for Recordation
By and Return to
Bank Of America
National Trust And Savings Association
Auburn Office #878
900 High Street
Auburn, California 95603

Deed Of Trust

This Deed Of Trust, made this 3rd day of December, 1980, Between William A. Newsom, an unmarried person, as Trustor ("Trustor" to be interpreted as "Trustors" where context requires), Continental Auxiliary Company, a California corporation, as Trustee, and Bank Of America National Trust And Savings Association, a national banking association, as Beneficiary.

Witnesseth: That Trustor Irrevocably Grants, Transfers and Assigns to Trustee, in Trust, with Power of Sale, the following described property situate in the County of Placer, State of California, to wit:

Parcel One:

Lot 7, Block 5, Town of Dutch Flat, as per map thereof filed June 12, 1871 in Book C of Maps page 6, Placer County Records.

Parcel Two:

Lot 3, Block 6, Town of Dutch Flat, as per map thereof filed June 12, 1871 in Book C of Maps page 6, Placer County Records.

Parcel Three:

Lot 4, Block 6, Town of Dutch Flat, as per map thereof filed June 12, 1871 in Book C of Maps page 6, Placer County Records.

Assessor's Parcel No.: 062 091 03 00

Property Address:

Secord Alley
Dutch Flat, California 95714

* * *

For the Purpose of Securing: (1) Payment of the sum of $50,000.00 with interest thereon according to the terms of a promissory note or notes dated December 3, 1980 made by Trustor, payable to the order of the beneficiary.

Mailing Address For Notices
Street City and State
P.O. Box 160
Dutch Flat, California 95714

Signature of Trustor
/s/ William A. Newsom
William A. Newsom

STATE OF CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO } ss:

On this day of December, 1980, before me the undersigned a Notary Public in and for said County, personally appeared William A. Newsom known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

Witness my hand and official seal.

/s/ Nancy A. Deering
Notary Public in and for
said County and State
My Commission expires
4/8, 1983

Official Seal
Nancy A. Deering
Notary Public-California

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APPENDIX MM

Affidavit of William M. Lukens

William M. Lukens duly deposes and says:

1. I have obtained public records from the Superior Court in and for the City and County of San Francisco in the *Estate of William A. Newsom*, Sup. Ct. No. 217-391, and in the *Estate of Christine A. Newsom*, Sup. Ct. No. 223-586, which contain information showing a substantial adversary relationship existing between David B. Flinn, counsel for the Bank of America in this case, and Justice William A. Newsom, who was a member of the panel of the California Court of Appeal, Division One, which reversed a money judgment in favor of petitioner Irene O'Connell Kruse against the Bank of America. Justice Newsom was executor of both of the above estates. Documents in Appendices S through LL and NN are true and correct copies of public records from the governmental entities denominated on each document.

2. In July of 1981, Mr. Flinn's law partner, Harvey L. Gould, representing two sisters and a brother of Justice Newsom, wrote to the Probate Department of the San Francisco Superior Court advising that "objections" would be filed by Mr. Flinn to petitions in connection with the probate of the parents' estate in which another of Justice Newsom's brothers, Brennan J. Newsom, was acting as the Justice's attorney. App V 9-10. The letter states that "Mr. Flinn of our office is handling these matters on behalf of our clients, Barbara Newsom, Sharon Mohun and Patrick Newsom, but that Mr. Flinn is presently on vacation." If a continuance were granted, Mr. Gould states, "it appears that he [Mr. Flinn] would be able to personally handle the hearings. In this regard, it is my understanding that, on behalf of our client, Mr. Flinn does intend to file objections to the various petitions." App. V 9-10.

3. In August of 1981, Mr. Gould filed an objection to a petition for attorneys' fees requested by Brennan Newsom charging "negligence in the performance of his duties" and

"breach of fiduciary obligations by the use of estate assets for his own uses and purposes in a number of various transactions, the specifics of which could only adequately and fully be pleaded and proved herein by David B. Flinn, and respondents pray leave to amend this objection appropriately after Mr. Flinn's return from vacation." App. W 11-14. It was further alleged that upon the filing of an accounting in the estate, Justice Newsom's sisters and brother would be entitled to have Brennan Newsom's share surcharged in an amount that will exceed his one-sixth share of the estate and that if his fee petition is granted, respondents "fear that the further diminution of assets in the estate will accordingly jeopardize their chances of receiving the full inheritance to which they are entitled." App. W 11-14.

4. The objection states that "the attorney who has handled the estate and related matters for respondents is David B. Flinn . . . *Mr. Flinn is the only attorney in the law firm with sufficient familiarity with these matters* to fairly represent Respondents' interests regarding the Petition to which this objection is in reply." (Emphasis added.) App. W 11-14, X 15-17.

5. In September of 1981, Justice Newsom filed accountings in his parents' estates App. Z 19-20 to which Mr. Flinn objected, questioning whether the items of account were "fully and truly reflective of actual events and/or reflect proper items of receipt or disbursement." App. AA 21, BB 22-24, CC 25-26.

6. In March of 1983, Mr. Flinn's firm filed a petition to compel Justice Newsom to account, which requests a court order citing Justice Newsom to appear and show the condition of the estate and the reasons why the estate cannot be distributed and closed. A request is included that if an accounting is not filed within ten days "the executor be removed as executor and that a new executor be appointed in his place" and "that if necessary the court compel the accounting by attachment as provided in Probate Code section 922 and order a reduction in fees pursuant to Probate Code section 1025.5". App. DD 27-30.

7. On May 17, 1983, Justice Newsom filed a declaration in which he stated that his services in the estate include negotiations "with and between heirs on obligations involved with closely-held real estate investment corporation involving Estate, and various heirs individually, bank loans, renunciation of a [sic] heirs interest in Estate in *partial resolution* of certain aspects of such obligations and *disputes over them.*" (Emphasis added) App. FF 35-39.

8. In May of 1983, Justice Newsom petitioned for approximately $33,000 in extraordinary fees and then one week later waived the entire amount as part of a stipulation with Mr. Flinn's law firm to allow settlement of the estate. App. EE 31-34, FF 35-39, GG 40-42, HH 43-44. His brother, Brennan Newsom, made similar concessions in the stipulation, waiving fees of approximately $31,000. App. EE 31-34, GG 40-42. Mr. Flinn's firm and clients reserved their rights to take future action by limiting the stipulation to "not objecting" to the final account submitted by Justice Newsom and specifically providing that by so doing they "shall not signify their confirmation or verification of any of the matters stated by the executor. . . ." App. GG 40-42.

9. I also have obtained copies of public records from the Recorder's Office of the County of Placer, California. App. II 45-56. Those records reveal that from 1977 through 1983, Justice Newsom and his brother, Brennan Newsom, were involved in 96 real estate filings related to transactions involving the purchase, sale and refinancing of real estate for their own accounts in the County of Placer and that some of the down payments for purchases of real estate were financed with borrowings from the Squaw Valley Improvement Corporation. App. JJ 57-59 through LL 62-64. App. T 5-6.

Dated: January 9, 1989

William M. Lukens

Sworn to and subscribed before
me this 9th day of January, 1989.

Raynetta M. Pettaway
Notary Public

APPENDIX NN

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Re: Case No. A013986
Corea-Sanchez et al. v.
Bank of America, etc.,
Virgil McGowen
Division One

Gentlemen:

The Honorable John W. Holmdahl has disqualified himself from participating in the decision in this case. The new panel of judges consists of the Honorable John T. Racanelli and the Honorable William A. Newsom, who, as members of the original panel heard oral argument in this case, and the Honorable Norman Elkington who replaces Justice Holmdahl.

The parties are invited to stipulate that the matter may be considered without further oral argument by the reconstituted panel, of which only two members have heard argument. Response is requested within ten days from the date of this letter.

Very truly yours,

/s/ C. Porter
Clerk

CCP:pk